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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 16814 (CIVIL)

DONALD I. TILTON,
APPELLANT,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
APPELLEE

No. 16815 (CIVIL)

WILFRED L. BECK, JR.,
APPELLANT,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
APPELLEE

No. 16816 (CIVIL)

GUY H. McCLEARN, JR.,
APPELLANT,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

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Docket Entries
(Consolidated)

Date 1959	Proceedings
Oct. 15	Complaint filed & summons issd.
Oct. 22	Marshal's return to summons, etc., filed. (Executed on deft. by serving Mark M. Hennelly, Gen'l Solicitor on 10-20-59).
Oct. 30	Amended complaint filed by pltff.
Nov. 9	Motion of deft. for consolidation of cases 59C 301(2), 59C 302(1) and 59C 303(3) for the purposes of trial, filed. Motion of deft. to dismiss complaint and amended complaint, with attached supporting memo., filed.
Nov. 12	Order filed & entered sustaining joint motion of deft. to consolidate cases 59C 301(2), 302(1) and 303(3) and directing case 59C 302(1) be transferred from Court One to Court 2; that case 59C 303(3) be transferred from Court 3 to Court 2, for consolidation of such cases for trial in Court 2. Notices thereof mailed to Harry Richards & M. M. Hennelly.
Nov. 19	Mo. to dismiss & entire file to Judge Harper.
Dec. 11	Second amended petition filed.
Dec. 17	Order filed in consolidated cases 59C 301, 302 and 303 overruling separate motions of deft. heretofore filed to dismiss each of said cases, pltff. having filed a second amended complaint in each case. Notices thereof mailed to Harry Richards and M. M. Hennelly.
Dec. 24	Answer to second amended complaint & counterclaim & cross-claim in interpleader of deft. filed.

Date	Proceedings
1960	
Jan. 4	Pltffs' Memorandum in opposition to deft's motions to order additional parties brought in as defendants filed in consolidated cases 59C 301 & 303. Pltff's reply to deft's counterclaim filed in case 59C 301. Pltff's Memorandum in opposition to deft's motion for transfer of action, filed in case 59C 302. Pltff's reply to deft's counterclaim filed in case 59C 303.
Jan. 26	Order filed overruling separate motions of deft. (1) to bring in additional parties in cases Nos. 59C 301(2) and 59C 303(2) and (2) to transfer case No. 59C 302(2). Copies of order mailed to W. Francis Murrell and R. W. Yost.
Jan. 28	Set for May 12, 1960.
Feb. 25	Motion of deft. to set aside the Court's order on deft's motion to bring in additional parties, or, in the alternative, to modify said order, with attached supporting brief, filed in consolidated cases 59C 301 and 303.
Mar. 4	Pltffs' Memorandum in opposition to deft's motion to set aside or modify the Court's order on deft's motion to bring in additional parties, filed in consolidated cases 59C 301 and 303.
May 2	Consolidated cases 59C 301, 302 and 303 set for pre-trial conference on May 6, 1960 at 2:00 P.M. Notices thereof mailed to Francis F. Murrell and M. M. Hennelly.
May 6	Pre-trial conference had.

Date	Proceedings
1960	
May 12	Consolidated cases Nos. 59C 301, 302 & 303 having heretofore been set for trial this day, parties appear by counsel & announce ready. Separate motions of deft. filed in each of aforesaid cases for leave to amend its answer by deletion & interlineation filed, presented & granted. Stipulation as to certain facts filed. The introduction of evidence on behalf of pltffs. on trial of consolidated causes is commenced & concluded. Introduction of evidence on behalf of deft. is commenced & concluded & introduction of evidence in rebuttal on behalf of pltffs. is commenced, but not concluded & further hearing on final testimony passed to Friday, June 3, 1960.
Jun. 3	Further proceedings on trial of consolidated causes before the Court reset for Friday, June 17, 1960.
Jun. 16	Depositions (1 vol.) of witnesses Fred W. Ford, et al, filed jointly in case nos. 59C 301, 59C 302 & 59C 303.
Jun. 17	Final hearing in the above-consolidated causes resumed & concluded, Pltffs. granted 30 days after receipt of reporter's transcript to submit initial brief; deft. 30 days thereafter to present answering brief, and pltff. 15 days thereafter to present reply brief. Upon receipt of all briefs cause to be submitted.
Jun. 20	Marshal's return on subpoena addressed to Carl B. Edwards, filed and executed; served June 15, 1960.
Aug. 25	On appln., deft. granted an addnl. 7 days, or until Sept. 2nd within which to file brief in consolidated cases 59C 301, 302 & 303.

Date	Proceedings
1961	
Mar. 6	Memo. Opinion filed in consolidated cases 59C 301, 2 & 3, finding issues in favor of the deft. & directing attys. for the deft. to prepare findings of fact, conclusions of law & judg. for signature & entry by the Court.
	Copies thereof mailed by the Court to R. W. Yost, Harper Barnes and Francis Murrell.
Apr. 12	Motion of pltffs. for addnl. findings of fact in consolidated cases 59C 301, 302 & 303, filed.
May 3	Order filed in consolidated cases 59C 301, 302 & 303 overruling motion of pltffs. heretofore filed for addnl. findings of fact.
	Findings of Fact & Conclusions of Law filed in said consolidated cases, adopting the stip of facts filed herein by the parties & the Memo. Opinion filed by the Court, & Judg. in accordance therewith filed & entered decreeing pltffs. shall not have any relief in these cases & dismissing each action on the merits.
	Copies of Order & Judg., together with transmittal letter, mailed to R. W. Yost and to Francis Murrell.
May 26	Notice of appeal of plaintiff from judgment entered May 3, 1961. Copy of notice mailed to Robert W. Yost, atty. for defendant.
July 3	Pltffs' designation of contents of record on appeal in consolidated cases 59C 301, 302 & 303 filed.
July 5	Certified copy of Notice of Appeal together with two certified copies of Clerk's Docket entries delivered to Clerk, C. C. A., 8th Circuit.

Complaint (Tilton Case)

(Filed in U. S. District Court—October 15, 1959)

Comes now the plaintiff and for his cause of action herein states:

1. Jurisdiction of this action is conferred upon the Court by Section 9 of the Universal Military Training and Service Act (Act of June 24, 1948, c. 625, Title I Section 9, 62 Stat. 614, as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Section 9(c)(1) of the Act relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court.

4. Plaintiff was originally employed by the defendant in July, 1949, at its place of business in Kansas City, Missouri. On April 1, 1950, plaintiff was promoted to the position of upgraded helper, a position the duties and functions of which were other than temporary, and plaintiff continued in such position until his induction into the Armed Forces. On October 16, 1950 plaintiff was inducted into the Armed Forces.

5. Plaintiff was honorably discharged from the Armed Forces on December 21, 1951 and possesses a certificate of satisfactory performance of military service and has otherwise met all the requirements of Section 9 of the Act.

6. Plaintiff, on January 2, 1952, returned to the employment of the defendant and was reinstated as upgraded helper. On August 28, 1956, plaintiff met all the requirements for and was promoted to the position of carman. Defendant established the date of plaintiff's seniority in the position of carman as August 28, 1956, the date of promotion. Plaintiff states that this is in violation of the reemployment rights under Section 9(c)(1) of the Act, which entitled him to have his seniority established from the date on which he would have qualified for the position for car-

man, April 1, 1953, had he not been inducted into the Armed Forces.

WHEREFORE, Plaintiff prays judgment against the defendant, requiring the defendant to restore to plaintiff his rightful seniority status, together with any pay or additional sums of money that he might be entitled to, due to the unlawful withholding of his seniority rights, and such other and further relief as the Court may deem just and proper, and for costs.

COMPLAINT (BECK CASE)

(Filed in U. S. District Court—October 15, 1959)

Comes now the plaintiff and for his cause of action herein states:

1. Jurisdiction of this action is conferred upon the Court by Section 9 of the Universal Military Training and Service Act (Act of June 24, 1948, c. 625, Title I Section 9, 62 Stat. 614 as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Section 9(c)(1) of the Act relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court.

4. Plaintiff was originally employed by the defendant on May 12, 1950, at its place of business in Alexandria, Louisiana. On October 12, 1951, plaintiff was promoted to the position of upgraded helper, a position the duties and functions of which were other than temporary, and plaintiff continued in such position until his induction into the Armed Forces. On March 3, 1955 plaintiff was inducted into the Armed Forces.

5. Plaintiff was honorably discharged from the Armed Forces on March 1, 1957 and possesses a certificate of satisfactory performance of military service and has otherwise met all the requirements of Section 9 of the Act.

6. Plaintiff, on March 9, 1957, returned to the employment of the defendant and was reinstated as upgraded helper. On December 5, 1957, plaintiff met all the requirements for and was promoted to the position of carman. Defendant established the date of plaintiff's seniority in the position of carman as December 5, 1957, the date of promotion. Plaintiff states that this is in violation of the reemployment rights under Section 9(c)(1) of the Act, which entitled him to have his seniority established from the date on which he would have qualified for the position of carman, December 5, 1955, had he not been inducted into the Armed Forces.

WHEREFORE, Plaintiff prays judgment against the defendant, requiring the defendant to restore to plaintiff his rightful seniority status, together with any pay or additional sums of money that he might be entitled to, due to the unlawful withholding of his seniority rights, and such other and further relief as the Court may deem just and proper, and for costs.

COMPLAINT (MCCLEARN CASE).

(Filed in U. S. District Court—October 15, 1959)

Comes now the plaintiff and for his cause of action herein states:

1. Jurisdiction of this action is conferred upon the Court by Section 9 of the Universal Military Training and Services Act (Act of June 24, 1948, c. 625, Title I Section 9, 62 Stat. 614, as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Section 9(c)(1) of the Act relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this court.

4. Plaintiff was originally employed by the defendant on May 24, 1950, at its place of business in St. Louis, Missouri. On August 23, 1951, plaintiff was promoted to the position of upgraded helper, a position the duties and functions of which were other than temporary, and plaintiff continued in such position until his induction into the Armed Forces. On October 23, 1951 plaintiff was inducted into the Armed Forces.

5. Plaintiff was honorably discharged from the Armed Forces on June 2, 1953 and possesses a certificate of satisfactory performance of military service and has otherwise met all the requirements of Section 9 of the Act.

6. Plaintiff, on June 11, 1953, returned to the employment of the defendant and was reinstated as upgraded helper. On December 24, 1957, plaintiff met all the requirements for and was promoted to the position of carman. Defendant established the date of plaintiff's seniority in the position of carman as December 25, 1957. Plaintiff states that this is in violation of the reemployment rights under Section 9(c)(1) of the Act, which entitled him to have his seniority established from the date on which he would have qualified for the position of carman, April 20, 1956, had he not been inducted into the Armed Forces.

WHEREFORE, Plaintiff prays judgment against the defendant, requiring the defendant to restore to plaintiff his rightful seniority status, together with any pay or additional sums of money that he might be entitled to, due to the unlawful withholding of his seniority rights, and such other and further relief as the Court may deem just and proper, and for costs.

Second Amended Complaint (Tilton Case)

(Filed in U. S. District Court—December 11, 1959)

Comes now the plaintiff and for his cause of action herein states:

I

1. Jurisdiction of this action is conferred upon the Court by Section 9(d) of the Universal Military Training and Service Act (Act of June 24, 1948, c. 625, Title I Section 9, 62 Stat. 615, as amended, 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Sections 9(b), 9(c)(1) and 9(c)(2) of the Act, relating to seniority rights, seeking relief on a primary basis and, if that fails, an alternative basis.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court, but at certain past times, the business of said defendant was conducted by a trustee; and "defendant" as used herein includes such trustee where factually warranted.

4. Plaintiff was first employed by defendant in July, 1949, as a carman helper at its place of business in Kansas City, Missouri, and continued in its active employment in that and other positions, each of which was a "position other than a temporary position" under the Act, until he left such position for the armed forces on October 16, 1950.

5. At all relevant times there existed for employees within the carman craft a series of written labor agreements, with amendments and supplements thereto, between defendant and System Federation No. 2 of Railway Employees' Department A. F. of L., hereafter called "the union." These agreements operated at the times therein indicated, to define the contract rights of employees of the carman craft.

II

6. A basic written agreement effective July 1, 1936, operative at all relevant times, defined seniority areas, made

the seniority of carman (mechanics) separate from carman helpers, and dated seniority of all employees "from the time pay starts when employed or reemployed." Ranking on a seniority roster reflected the seniority date, and "employed" meant "employed as carman" or "employed as carman helper", etc.. (Rules 25(a), (c) and (e) of 1936 contract.)

7. Defendant and the union made a collateral agreement effective July 1, 1943 under which, because of a shortage of "qualified carmen" (here meaning persons with carman mechanic seniority in defendant's employ), certain classes of non-mechanics in the carman craft should be advanced to service as carman mechanics, in a fixed order of priority. The agreement provided that, within the class of carman helpers, promotion to "temporary mechanic" (meaning "temporary carman," also called "upgraded helper") should be made "with due regard to their order of seniority, qualifications for advancement, etc. . . . All selections being made jointly by the Shop Superintendent or Master Mechanic and Employes' Local Committee." Under the contract, helpers advanced to mechanic (carman) would not at once acquire seniority as under Rule 25(e) of the 1936 agreement, but, on accumulating three years service as a mechanic, had the right to acquire seniority as mechanic as of the latter date, or, in their option, revert to helper. (Agreement of June 18, 1942, effective July 1, 1942 except par. 4 and pars. 9 to 11, and all after par. 12). This agreement was effective until superseded by an agreement of December 7, 1953.

8. On April 1, 1950, plaintiff was promoted from carman helper to "temporary carman" by the selection process of the 1942 agreement and continued in that position until October 23, 1951, when he left for the Armed Forces, being inducted on October 27, 1951, and during that time he performed carman (mechanic) work at carman pay as provided in the 1942 agreement but held only carman helper seniority.

Plaintiff's primary claim for relief is based on the 1936 and 1942 agreements, under which he would automatically

and by right, free of employer discretion, have acquired carman seniority on and with a date of April 1, 1953, if he had not served in the Armed Forces.

9. The 1942 contract had this effect: (a) the only discretion provided for the employer, permitted, or, in practice, exercised, was that used in the original selection of a carman helper for promotion to temporary carman mechanic; (b) a carman helper so promoted is fully qualified for carman work; (c) practice under the contract showed that temporary carmen who were upgraded helpers acquired carman seniority exactly three years after their selection and upgrading; (d) three years "service as a mechanic" meant three calendar years after promotion to "temporary carman"; (e) in practice neither the amount nor quality of experience in carman work affected the right of a temporary carman to carman seniority on the third anniversary of his promotion, though he could elect to revert to carman helper; (f) withholding carman seniority on promotion to temporary carman was intended to protect the seniority of employees who had become carmen before July 1, 1942, and who were in military service; (g) the employer neither had, nor attempted to exercise, discretion as to granting upgraded helpers carman seniority on the third anniversary of upgrading, or as to deferring their seniority or altering the date. Plaintiff, who became a "temporary carman" before military service, had a right under the Act, on reinstatement or thereafter, depending on the timing of the third anniversary of his promotion, to have that third anniversary as his carman seniority date, if he continued as a carman.

10. Plaintiff was discharged from the armed forces on December 21, 1951, with a certificate of satisfactory service, applied for statutory rights and otherwise met all the requirements of Section 9 of the Act.

11. On January 2, 1952, plaintiff was returned to the active employment of defendant in the position of "temporary carman" with his original carman helper date.

12. From January 2, 1952, until April 1, 1953, plaintiff remained a temporary carman, and as of April 1, 1953,

had retained that position for three years after his promotion, apart from his military absence.

13. Plaintiff voluntarily continued as carman on and after April 1, 1953, and therefore became automatically and at once entitled to a carman seniority date of April 1, 1953, and lost his carman helper seniority under the 1942 agreement. Defendant has at all times failed to treat plaintiff's military absence as time in employment as temporary carman, or as part of the three years after upgrading for which carman seniority was deferred by the 1942 contract, has refused to recognize plaintiff's seniority date as April 1, 1953, and wrongfully withheld all carman seniority from plaintiff until August 28, 1956, when defendant assigned plaintiff a carman seniority date of August 28, 1956, with resulting inferior ranking on the seniority list.

III

If plaintiff's primary claim should not prevail, plaintiff makes this alternative claim, based on the above and the following:

14. On December 7, 1953, defendant and the union made an agreement, effective generally as of July 1, 1953, superseding the 1942 agreement. The 1953 contract provided for future advancement of non-mechanics to temporary carman; for the listing of all present and future temporary carmen by date of upgrading, which date controlled priority for carman work, and for retention in grade in case of reduction in force. Under the contract, a helper advanced to carman retains helper seniority, but works and is paid as a carman. On completion of 1040 days work as carman "he shall be considered as a qualified carman" and "will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper . . ." "Qualified carman" as last used meant an employee who had performed 1040 days of carman's work, who then had an unconditional right to seniority as carman. Under this agree-

ment, defendant neither had, nor in practice exercised, any discretion, except in upgrading carman helpers to temporary carman; but an upgraded helper who completed 1040 days at carman work, having been notified of that fact by the employer as practice required, had an automatic right to carman status and seniority if he chose them.

15. Between his promotion on April 1, 1950, and the date when the upgrading list was set up under the 1953 agreement, plaintiff had an automatic right to work as carman on every day that carman work was available to any upgraded helper who had no more helper seniority than he. Plaintiff worked as carman on substantially every day when carman work was available to him under said rule, except between October 16, 1950, and January 2, 1952, during his military absence, during which time he would, if present, have had the same right and would so have exercised it.

16. After the upgrading list was established, plaintiff had under the 1953 agreement an automatic priority for carman work based on the order of his upgrading to temporary carman and worked as carman on every day on which, under defendant's interpretation of the contract and the Act, he was entitled to said work.

17. On August 28, 1956, plaintiff completed 1040 days of carman work and, on being notified thereof, immediately elected carman's seniority and surrendered his helper seniority; thereupon defendant assigned to plaintiff a carman seniority date of August 28, 1956, and the resulting ranking.

18. If plaintiff had not performed military service, he would have completed 1040 days of carman work in a shorter time than that elapsing between January 2, 1952, and August 28, 1956, because during part of the latter period less carman work was needed, more carmen being available because they were not in the armed forces; and further because during the latter period employees who had been junior to plaintiff as carman helper and who had been upgraded after him, having acquired carman seniority before he could do so and before they otherwise would have because of plaintiff's military service, were allowed priority for carman work by defendant because of their carman

seniority, none of which could have affected plaintiff had he not been in military service.

19. Plaintiff would have chosen carman seniority and relinquished his seniority as helper at any time and under any condition through which he could have acquired carman seniority.

20. Seniority as carman represents ranking on the carman seniority list to which a precise date is not always a necessity, but plaintiff avers that, except for military service, he would have completed 1040 days of carman work before August 28, 1956, and before the date when the first carman helper upgraded after him or junior to him completed 1040 days work. Plaintiff further avers that he would have elected carman seniority and on so electing would have had an automatic right to a seniority date and ranking as above described, as required by the Act.

21. Defendant has refused any adjustment of plaintiff's carman seniority, and has thereby penalized him by at least one day in seniority date for each day when he would have worked as carman during his military absence, with resulting loss of seniority ranking; this has caused, and will cause, loss of earnings to plaintiff as a consequence, in violation of Sections 9(b), 9(c)(1) and 9(c)(2) of the Act.

IV

Wherefore plaintiff prays judgment against the defendant, requiring defendant to accord plaintiff the seniority date of April 1, 1953, as carman with the appropriate ranking, or in the alternative to restore to plaintiff his rightful seniority date and ranking as carman, together with any damages to which he may be entitled due to the unlawful withholding of his seniority rights on and after April 1, 1953, or in any event after August 28, 1956, and such other and further relief as the Court may deem just and proper, and for costs.

Second Amended Complaint (Beck Case)

(Filed in U.S. District Court—December 11, 1959)

Comes now the plaintiff and for his cause of action herein states:

I

1. Jurisdiction of this action is conferred upon the Court by Section 9 (d) of the Universal Military Training and Service Act, (Act of June 24, 1945, c. 625, Title I Section 9, 62 Stat. 615, as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Sections 9 (b), 9 (c) (1) and 9 (c) (2) of the Act, relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court, but at certain past times, the business of said defendant generally was conducted by a trustee; and "defendant" as used herein includes such trustee where factually warranted.

4. Plaintiff was first employed by defendant on May 12, 1950, as a carman helper at its place of business in Alexandria, Louisiana, and continued in defendant's active employment in that and other positions, each of which was a "position other than a temporary position" under the Act, until his induction into the armed forces on March 5, 1955.

5. At all relevant times there existed for employees within the carman craft a series of written labor agreements, with amendments and supplements thereto, between defendant and System Federation No. 2 of Railway Employees' Department, A. F. of L., hereinafter called "the union." These agreements operated at the times therein indicated, to define the contract rights of employees of the carman craft.

II

6. A basic written agreement effective July 1, 1936, operative at all relevant times, defined seniority areas, made

the seniority of carman (mechanics) separate from carman helpers, and dated seniority of all employees "from the time pay starts when employed or reemployed." Ranking on a seniority roster reflected the seniority date, and "employed" meant "employed as carman" or "employed as carman helper". (Rules 25 (a), (c) and (e) of 1936 contract.)

7. Defendant and the union made a collateral agreement effective July 1, 1942, under which, because of a shortage of "qualified carmen" (here meaning persons with carman mechanic seniority in defendant's employ), certain classes of non-mechanics in the carman craft should be advanced to service as carmen mechanics, in a fixed order of priority. The agreement provided that, within the class of carman helpers, promotion to "temporary mechanic" (meaning "temporary carman," also called "upgraded helper") should be made "with due regard to their order of seniority, qualifications for advancement, etc. . . . All selections being made jointly by the Shop Superintendent or Master Mechanic and Employes' Local Committee." The agreement also provided that helpers who became "temporary carmen" could acquire seniority as carmen mechanics after such promotion, but not at once as provided by the 1936 agreement; but that on being selected as above, they should perform carman work and receive carman pay. The 1942 agreement was superseded by an agreement of December 7, 1953.

8. On October 12, 1951, plaintiff was promoted to "temporary carman" by the process provided for on July 1, 1942, described above, and continued in that position until March 3, 1955, (when he left for military service), performing carman work at carman pay but, because of the intervening agreement of December 7, 1953, not having acquired carman seniority.

9. The contract of July 1, 1942, had this effect: (a) the only discretion provided for the employer, permitted, or, in practice, exercised, was that used in the original selection of a carman helper for upgrading to temporary carman; (b) a carman helper so promoted is fully qualified

for carman work; (c) seniority as carman is withheld until the third anniversary of initial upgrading, at which time the temporary carman may elect carman seniority or revert to carman helper, with the helper seniority he has retained; (d) withholding of carman seniority on upgrading to temporary carman, and use of the term "temporary carman," were designed to protect carmen who had acquired seniority before July 1, 1942, and who were in the armed forces; (e) the position of temporary carmen on the carman helper roster controlled their right to do carman work, with no right of discretion in the employer; for carman work, temporary carmen received carman pay.

10. The superseding agreement of December 7, 1953, effective in part on August 1, 1953, provided for advancement of employees to temporary carmen in the future; it further provided for listing all present and future temporary carmen by date of upgrading from helper to temporary carman, and made date of upgrading the controlling factor for priority of entitlement to do carman work, and for retention in grade in case of reduction in force. A helper so advanced to temporary carman retains seniority as helper, but, on completion of 1040 days of service as carman, "he shall be considered as a qualified carman," and "will make his choice in writing to acquire a seniority date, as carman, as of the ending date of the 1040 days of service as such, and relinquish his seniority as helper. If he fails to do so he will return to status of helper. . . ." "Qualified carman," as therein used, meant an employee with an unconditional right to seniority as carman in defendant's employment. Under the 1953 agreement, the defendant neither had, nor in practice exercised, any discretion or judgment, except in the upgrading of carman helper to temporary carman; a temporary carman who had completed 1040 days at carman work had an automatic right to choose carman status and seniority. The employer had no right, discretionary or otherwise, to postpone or reduce the carman seniority of an upgraded helper who had, through 1040 days of carman work, earned and elected seniority as a carman, or to deny

him status as carman achieved through such work and election.

11. Between his upgrading to temporary carman on October 12, 1951 and December 7, 1953, (or the later date when the upgrading list was set up by the employer pursuant to the agreement of December 7, 1953), plaintiff had an automatic right to work as carman on every day that carman work was available to temporary carmen who had been helpers and who had no greater helper seniority than he; and from the time when the upgrading list was set up after the agreement of December 7, 1953, until March 3, 1955, when he was inducted into the armed forces, plaintiff had an automatic right to work, as temporary carman, on every day when carman work was available under said rules to any carman helper upgraded after him; and between October 12, 1951, and his induction on March 3, 1955, plaintiff so worked on substantially every day when carman work was available under said rules and performed more than 800 days of such work.

12. Plaintiff was honorably discharged from military service on March 1, 1957. He applied for statutory rights, and otherwise met all the requirements of Section 9 of the Act, and on March 9, 1957, returned to the active employment of defendant, and was reinstated as a temporary carman.

13. Between March 9, 1957, and December 5, 1957, the plaintiff had an automatic right to carman's work, consistent with his date of upgrading under the 1953 agreement, and worked as carman on every day on which, under defendant's interpretation of the contract and of the Act, he was entitled thereto.

14. On December 5, 1957, plaintiff actually completed 1040 days of carman's work, performed by him as temporary carman, and, on being informed thereof by the employer, as was the established practice and his right, immediately elected carman seniority and surrendered his helper seniority; thereupon the defendant assigned to plaintiff a carman seniority date of December 5, 1957, and the ranking resulting therefrom.

15. Had Plaintiff not performed military service, he would, between March 3, 1955 and March 9, 1957, have performed carman work on substantially every day when he had a right thereto, based on his date of upgrading to temporary carman, until he had completed 1040 days of carman work; and he would have completed 1040 days work before the date of his return from military service, and long before December 5, 1957.

16. If plaintiff had not been in military service, he would have completed the days needed, from and after his induction, to total 1040 in a shorter calendar time than that elapsing between March 9, 1957 and December 5, 1957, because during the latter period, employees junior to him as carman helper, and who were upgraded to temporary carman after him, had, because of his military absence, acquired carman seniority before he could; the defendant allowed these employees priority for carman work over plaintiff because they held such carman seniority, which could not have happened had he not been in military service.

17. Plaintiff would have chosen carman seniority, and relinquished his seniority as helper, at any time and under any condition through which he could have acquired carman seniority.

18. Seniority as carman represents ranking on the carman seniority list, to which a precise seniority date is not always a necessity, but plaintiff avers that, but for his military service, he would have completed 1040 days of carman work before December 5, 1957, and before the date when the first carman helper upgraded after him or junior to him completed 1040 days' work. Plaintiff further avers that he would have then elected carman seniority, and that, on his so electing carman seniority on December 5, 1957, his seniority date as carman, and his ranking, should have been established accordingly, as required by the Act.

19. Defendant has refused any adjustment of plaintiff's carman seniority, and has thereby penalized him by at least one day in seniority date for each day when he would have worked as carman during his military absence, with resulting loss of seniority ranking; this has caused, and

will cause, loss of earnings to plaintiff as a consequence, in violation of Sections 9(b), 9(c)(1) and 9(c)(2) of the Act.

III

Wherefore plaintiff prays judgment against the defendant, requiring defendant to restore to plaintiff his rightful seniority date and ranking as carman, together with any damages to which he may be entitled due to the unlawful withholding of his seniority rights on and after December 5, 1957, and such other and further relief as the Court may deem just and proper, and for costs.

SECOND AMENDED COMPLAINT (McCLEARN CASE)

(Filed in U.S. District Court—December 11, 1959)

Comes now the plaintiff and for his cause of action herein states:

I

1. Jurisdiction of this action is conferred upon the Court by Section 9(d) of the Universal Military Training and Service Act, (Act of June 24, 1948, c. 625, Title I, Section 9, 62 Stat. 614, as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Section 9(b), 9(c)(1) and 9(c)(2) of the Act, relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court, but at certain past times, its business was conducted by a trustee; and "defendant" as used herein includes such trustee where factually warranted.

4. Plaintiff was first employed by defendant on May 24, 1950 as a carman helper at its place of business in St.

Louis, Missouri, and continued in defendant's active employment in that and other positions, each of which was a "position other than a temporary position" under the Act, until he left for the armed forces on October 23, 1951.

5. At all relevant times there existed for employees within the carman craft a series of written labor agreements, with amendments and supplements thereto, between defendant and System Federation No. 2 of Railway Employees' Department, A. F. of L., hereinafter called "the union." These agreements operated at the times therein indicated, to define the contract rights of employees of the carman craft.

II

6. A basic written agreement effective July 1, 1936, operative at all relevant times, defined seniority areas, made the seniority of carman (mechanics) separate from carman helpers, and dated seniority of all employees "from the time pay starts when employed or reemployed." Ranking on a seniority roster reflected the seniority date, and "employed" meant "employed as carman" or "employed as carman helper." (Rules 25(a), (c) and (e) of 1936 contract).

7. Defendant and the union made a collateral agreement effective July 1, 1942 under which, because of a shortage of "qualified carmen," (here meaning persons with carman mechanic seniority in defendant's employ), certain classes of non-mechanics in the carman craft should be advanced to service as carman mechanic, in a fixed order of priority. The agreement provided that, within the class of carman helpers, promotion to "temporary mechanic" (meaning "temporary carman", also called "upgraded helper") should be made "with due regard to their order of seniority, qualifications for advancement, etc. . . . All selections being made jointly by the Shop Superintendent or Master Mechanic and Employes' Local Committee." The agreement also provided that helpers who became temporary carmen could acquire seniority as carmen mechanics after such promotion, but not at once as provided by the 1936 agreements; on being selected as above, they

should perform carman work and receive carman pay. The 1942 agreement was superseded by an agreement of December 7, 1953.

8. On August 23, 1951, plaintiff was promoted to "temporary carman" by the process provided for on July 1, 1942 and described above, and continued in that position until October 23, 1951, when he left for induction into the armed forces, being inducted on October 27, 1951. From August 23, 1951 until October 23, 1951, plaintiff was performing, as a temporary carman, carman work at carman pay, but was holding only carman helper seniority.

9. The contract of July 1, 1942 had this effect: (a) the only discretion provided for the employer, permitted, or, in practice, exercised, was that used in the original selection of a carman helper for upgrading to temporary carman; (b) a carman helper so promoted is fully qualified for carman work; (c) seniority as carman is withheld until the third anniversary of initial upgrading, at which time the temporary carman may elect carman seniority or revert to carman helper, with the helper seniority he has retained; (d) the withholding of carman seniority on upgrading to temporary carman, and use of the term "temporary carman," were designed to protect carmen who had acquired seniority before July 1, 1942, and who were in the armed forces; (e) the position of temporary carmen on the carman helper seniority roster controlled their right to do carman work, with no right of discretion in the employer; for carman work, temporary carmen received carman pay.

10. Before plaintiff could acquire carman seniority under the 1942 agreement, the superseding agreement of December 7, 1953 was adopted, effective in part on August 1, 1953. It provided for advancement of employees to temporary carman in future, for listing all present and future temporary carmen by date of upgrading from helper to temporary carman, and made such date of upgrading the controlling factor for priority of entitlement to do carman work, and for retention in grade in case of reduction in force. A helper so advanced to temporary carman re-

tains helper seniority, but, on completion of 1040 days of service as carman, "he shall be considered as a qualified carman," and "will make his choice in writing to acquire a seniority date, as carman, as of the ending date of the 1040 days of service as such, and relinquish his seniority as helper. If he fails to do so he will return to status of helper . . ." "Qualified carman" as therein used, meant an employee with an unconditional right to seniority as carman in defendant's employment. Under the 1953 agreement, the defendant neither had, nor in practice exercised, any discretion or judgment, except in the upgrading of carman helper to temporary carman; a temporary carman who had completed 1040 days at carman work had an automatic right to choose carman status and seniority. The employer had no right, discretionary or otherwise, to postpone or reduce the carman seniority of an upgraded helper who had, through 1040 days of carman work, earned and elected seniority as a carman, or to deny him status as carman achieved through such work and election.

11. Between his upgrading to temporary carman on August 23, 1951, and his induction on October 23, 1951, plaintiff, as a temporary carman, had an automatic right to work as carman on every day that carman work was available to temporary carmen who had been helpers and who had no greater helper seniority than he; he so worked on substantially every day when carman work was available under said rules.

12. Plaintiff was honorably discharged from military service on June 2, 1953. He applied for statutory rights, otherwise met all the requirements of Section 9 of the Act, and on June 11, 1953, returned to the active employment of defendant, and was reinstated as a temporary carman.

13. Plaintiff avers that if he had not been in military service, he would have had, between October 23, 1951 and June 11, 1953, the same priority for carman work as is described in paragraph 11 hereof, and would have worked on substantially every day when carman work would have been available to him under the 1942 rules.

14. Between June 11, 1953 and the date after December

7, 1953 when the upgrading list was established pursuant to the December 7, 1953 agreement, plaintiff had the same priority for carman work as is described in paragraph 11 hereof, and worked as a carman on substantially every day when carman work was available to him under defendant's interpretation of the 1942 rules and the Act.

15. After the establishment of the upgrading list, up to and including December 25, 1957, plaintiff had an automatic right to carman's work, consistent with his date of upgrading under the agreement of December 7, 1953, and worked as carman on every day on which under defendant's interpretation of the contract and the Act, he was entitled to said work.

16. On December 24, 1957, plaintiff actually completed 1040 days of carman's work, performed by him as a temporary carman, and, on being informed thereof by the employer, as was the establishment practice and his right, immediately elected carman seniority and surrendered his helper seniority; thereupon defendant assigned to plaintiff a carman seniority date of December 25, 1957, and the ranking resulting therefrom.

17. If plaintiff had not been in military service, he would have completed 1040 days of carman work in a shorter calendar time than that elapsing between June 11, 1953 and December 25, 1957 for the following reasons: During that period less carman work was needed, more carmen being available because they were not in military service. Also during that period, employees junior to plaintiff as carman helpers and who were upgraded after him, had, because of his military absence, acquired carman seniority before plaintiff could have, and before such junior employees would have but for plaintiff's absence; the defendant allowed them priority for carman work over plaintiff because they held carman seniority, none of which could have affected plaintiff had he not been in military service.

18. Plaintiff would have chosen carman seniority, and relinquished his seniority as helper, at any time and under any condition through which he could have acquired carman seniority.

19. Seniority as carman represents ranking on the carman seniority list, to which a precise seniority date is not always a necessity, but plaintiff avers that, but for his military service, he would have completed 1040 days of carman work before December 24, 1957, and before the date when the first carman helper upgraded after him or junior to him completed 1040 days' work. Plaintiff further avers that he would then have elected carman seniority, and that, on his so electing carman seniority on December 24, 1957, his seniority date as carman, and his ranking, should have been established accordingly, as required by the Act.

20. Defendant has refused any adjustment of plaintiff's carman seniority, and has thereby penalized him by at least one day in seniority date for each day when he would have worked as carman during his military absence, with resulting loss of seniority ranking; this has caused, and will cause, loss of earnings to plaintiff as a consequence, in violation of Sections 9(b), 9(c)(1) and 9(c)(2) of the Act.

III

WHEREFORE, plaintiff prays judgment against the defendant, requiring defendant to restore to plaintiff his rightful seniority date and ranking as carman, together with any damages to which he may be entitled due to the unlawful withholding of his seniority rights on and after December 25, 1957, and such other and further relief as the Court may deem just and proper, and for costs.

ANSWER TO SECOND AMENDED COMPLAINT AND COUNTERCLAIM AND CROSS CLAIM IN INTERPLEADER (TILTON CASE)

(Filed in U.S. District Court December 24, 1959)

I. First Defense

The plaintiff's second amended complaint, as well as his original complaint and his amended complaint, fails to state

a claim or cause of action against defendant upon which plaintiff is entitled to relief.

II. Second Defense

In answer to the second amended complaint and with reference to each paragraph thereof, defendant states:

1. Defendant admits the allegations in paragraph 1.

2. Defendant admits the allegations in paragraph 2, but denies that it has violated Sections 9(b), 9(c)(1) and 9(c)(2) of the Act, or any of them, in respect to plaintiff's seniority rights.

3. Defendant admits the allegations of paragraph 3, and, for clarification, states that defendant's properties were in the possession of and operated by Guy A. Thompson, Trustee, pursuant to Section 77 of the Bankruptcy Act, until March 1, 1956, when the properties and their operation were returned to defendant.

4. Defendant admits that plaintiff was first employed by defendant in July, 1949, specifically July 13, 1949, as a carman helper at its place of business in Kansas City, Missouri. Defendant also admits that plaintiff continued in its active employment in that position and as a "temporary carman" until he left for the Armed Forces in October, 1950, and admits that each such position was "a position other than a temporary position" under the Act. Defendant denies that plaintiff held any other position than as described herein and denies all other allegations of paragraph 4.

5. Defendant admits the allegations of paragraph 5.

6. Defendant denies that the basic written agreement effective July 1, 1936, was operative after September 1, 1949, but admits the other allegations of paragraph 6.

7. Defendant admits that defendant and the Union made a collateral agreement on June 18, 1942, effective July 1, 1942, under which certain classes of "non-mechanics" in the carman craft could be temporarily advanced to service as mechanics (carmen), when qualified mechanics were not available, and further admits that this agreement was effective until superseded on August 1, 1953, by an agree-

ment dated December 7, 1953. Defendant denies all other allegations of paragraph 7.

8. Defendant admits that in April, 1950, plaintiff was advanced from carman helper to "temporary carman" pursuant to the 1942 agreement, and continued in that position until October, 1950, when he left for the Armed Forces. Defendant admits that during that time, he performed such work of a carman (mechanic) as he was capable of, and at carman pay, but held only a carman helper seniority, all as provided in the 1942 agreement. Defendant denies all other allegations of paragraph 8.

9. Defendant denies all allegations of paragraph 9.

10. Defendant is without knowledge as to the truth of the allegations in paragraph 10, and, therefore, denies the same.

11. Defendant admits the allegations of paragraph 11.

12. Defendant admits that from January 2, 1952, until April 1, 1953, plaintiff worked as a temporary carman, but defendant denies the balance of paragraph 12.

13. Defendant admits that it has refused to recognize plaintiff's seniority date as April 1, 1953, and that plaintiff has been assigned a carman seniority date of August 28, 1956. All other allegations of paragraph 13 are denied.

14. Defendant admits that on December 7, 1953, defendant and the Union made an agreement which superseded the 1942 agreement; that the 1953 agreement provided for advancement of non-mechanics to temporary carmen, under certain conditions, and for the listing of present and future temporary carmen by date of upgrading; that under the said contract, a helper so advanced to temporary carman retains his helper seniority, but works and is paid as a carman; that on completion of 1,040 days work as carman, "he shall be considered as a qualified carman" and "will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1,040 days of service as such and relinquish his seniority as helper. If he fails to do so, he will return to status of helper." Defendant denies all other allegations in paragraph 14.

15. Defendant admits that between the date when plaintiff was advanced to temporary carman in April, 1950, and

the date when he left for military service in October, 1950, plaintiff had a right to work as carman on every day that carman work was available to any helper advanced after plaintiff was advanced, if such helper was on the same seniority roster. Defendant further admits that plaintiff worked as carman on substantially every day when carman work was available to him under the aforesaid rule, until he left for military service in October, 1950, and that if not absent in military service, he would have had the same right and would probably have exercised it. Defendant denies all other allegations in paragraph 15.

16. Defendant admits that under the 1953 agreement, plaintiff's priority for carman's work, as between him and other temporary carmen on the upgrading list, depended on the order of upgrading. Defendant denies all other allegations of paragraph 16.

17. Defendant admits the allegations in paragraph 17.

18. Defendant admits that if plaintiff had not performed military service, he would probably have completed his 1,040 days of carman work before August 28, 1956, but defendant is without knowledge as to the truth of the other allegations in paragraph 18, and, therefore, denies same.

19. Defendant is without knowledge as to the truth of the allegations of paragraph 19, and, therefore denies same.

20. Defendant admits that if plaintiff had not been on leave of absence and in military service, he could and probably would have completed 1,040 days of carman's work before August 28, 1956, and that he could and probably would have elected carman's seniority upon completion of his 1,040 days, but defendant denies that plaintiff had any right to elect such seniority at any time before actual completion of 1,040 days of work as a carman, and denies all other allegations of paragraph 20.

21. Defendant admits that it has refused to grant any retroactive seniority date or to make any other adjustment in plaintiff's seniority because of his military service, but defendant denies all other allegations in paragraph 21.

Answer to Second Amended Complaint and Counterclaim and Cross-Claim in Interpleader (Beck Case)

(Filed in U. S. District Court—December 24, 1959)

I. First Defense

The plaintiff's second amended complaint, as well as his original complaint and his amended complaint, fails to state a claim or cause of action against defendant upon which plaintiff is entitled to relief.

II. Second Defense

In answer to the second amended complaint and with reference to each paragraph thereof, defendant states:

1. Defendant admits the allegations in paragraph 1.

2. Defendant admits the allegations in paragraph 2, but denies that it has violated Sections 9(b), 9(c)(1) and 9(c)(2) of the Act, or any of them, in respect to plaintiff's seniority rights.

3. Defendant admits the allegations of paragraph 3, and, for clarification, states that defendant's properties were in the possession of and operated by Guy A. Thompson, Trustee, pursuant to Section 77 of the Bankruptcy Act, until March 1, 1956, when the properties and their operation were returned to defendant.

4. Defendant admits that plaintiff was first employed by defendant on May 12, 1950, as a carman helper at its place of business in Alexandria, Louisiana. Defendant further admits that plaintiff continued in its active employment in that position and as a "temporary carman" until he left for the armed forces on March 1, 1955, and admits that each such position was "a position other than a temporary position" under the Act. Defendant denies that plaintiff held any other position than as described herein and denies all other allegations of paragraph 4.

5. Defendant admits the allegations of paragraph 5.

6. Defendant denies that the basic written agreement effective July 1, 1936 was operative after September 1, 1949, but admits the other allegations of paragraph 6.

7. Defendant admits that defendant and the Union made a collateral agreement on June 18, 1942, effective July 1, 1942, under which certain classes of "non-mechanics" in the carmen craft could be temporarily advanced to service as mechanics (carmen), when qualified mechanics were not available, and further admits that this agreement was effective until superseded on August 1, 1953 by an agreement dated December 7, 1953. Defendant denies all other allegations of paragraph 7.

8. Defendant admits that on October 12, 1951, plaintiff was advanced from carman helper to "temporary carman" pursuant to the 1942 agreement, and continued in that position until March 1, 1955 (when he left for military service), performing, as a temporary carman, such carman's work as he was capable of at carman's pay. Defendant admits that before plaintiff could acquire carman's seniority under the 1942 agreement, the superseding agreement of December 7, 1953 was adopted. Defendant denies all other allegations of paragraph 8.

9. Defendant denies all allegations of paragraph 9.

10. Defendant admits that the 1953 agreement provided for advancement of non-mechanics to temporary carmen, under certain conditions, and for the listing of present and future temporary carmen by date of upgrading; that under the said contract, a helper so advanced to temporary carman retains his helper seniority, but works and is paid as a carman; that on completion of 1,040 days work as carman, "he shall be considered as a qualified carman" and "will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1,040 days of service as such and relinquish his seniority as helper. If he fails to do so, he will return to status of helper." Defendant denies all other allegations in paragraph 10.

11. Defendant admits that between his upgrading to temporary carman on October 12, 1951 and March 1, 1955 when he left for military service, plaintiff had a right to work as a carman on every day that carman's work was available to temporary carman on the same seniority ros-

ter, upgraded after October 12, 1951, and that between October 12, 1951 and March 1, 1955, plaintiff worked as a carman on substantially every day when carman work was available under the aforesaid rule. Defendant denies all other allegations in paragraph 11.

12. Defendant is without knowledge as to the truth of plaintiff's allegations that he was honorably discharged from military service on March 1, 1957, and that he otherwise met all of the requirements of Section 9 of the Act. Defendant admits that on March 11, 1957, he returned to the active employment of defendant and was reinstated as a temporary carman with a Carman helper's seniority.

13. Defendant admits that between March 11, 1957 and December 5, 1957, the plaintiff had a right to do carman's work depending upon his date of upgrading under the 1953 agreement, and that he worked as carman on substantially every day on which his date of upgrading gave him the right to work as a carman. Defendant denies all other allegations of paragraph 13.

14. Defendant admits the allegations of paragraph 14.

15. Defendant admits that if plaintiff had not been in military service between March 3, 1955 and March 9, 1957, he would have probably performed carman work on substantially every day when he had a right to do so based upon his date of upgrading to temporary carman until he had completed 1,040 days of carman work. Defendant also admits that he would probably have completed 1,040 days of carman work before March 9, 1957.

16. Defendant admits that if the plaintiff had not been in military service, he would probably have completed his 1,040 days of carman work before December 5, 1957, but defendant is without knowledge as to the truth of the other allegations in paragraph 16, and, therefore, denies the same.

17. Defendant is without knowledge as to the truth of the allegations in paragraph 17, and, therefore, denies same.

18. Defendant admits that if plaintiff had not been on leave of absence and in military service, he could, and probably would, have completed 1,040 days of carman work before Deeember 5, 1957, and that he could, and probably

would, have elected carman's seniority upon completion of his 1,040 days. Defendant denies all other allegations of paragraph 18.

19. Defendant admits that it has refused to grant any adjustment in the plaintiff's carman seniority because of his military service, but defendant denies all other allegations of paragraph 19.

ANSWER TO SECOND AMENDED COMPLAINT AND COUNTERCLAIM AND CROSS CLAIM IN INTERPLEADER (MCCLEARN CASE)

(Filed in U.S. District Court December 24, 1959)

I. First Defense

The plaintiff's second amended complaint, as well as his original complaint and his amended complaint, fails to state a claim or cause of action against defendant upon which plaintiff is entitled to relief.

II. Second Defense

1. Defendant admits the allegations in paragraph 1.

2. Defendant admits the allegations in paragraph 2, but denies that it has violated Sections 9(b), 9(c)(1) and 9(c)(2) of the Act, or any of them, in respect to plaintiff's seniority rights.

3. Defendant admits the allegations of paragraph 3, and, for clarification, states that defendant's properties were in the possession of and operated by Guy A. Thompson, Trustee, pursuant to Section 77 of the Bankruptcy Act, until March 1, 1956, when the properties and their operation were returned to defendant.

4. Defendant admits that plaintiff was first employed by defendant on May 24, 1950 as a carman helper at its place of business in St. Louis, Missouri. Defendant also admits

that plaintiff continued in its active employment in that position and as a "temporary carman" until he left for the Armed Forces on October 23, 1951, and admits that each such position was "a position other than a temporary position" under the Act. Defendant denies that plaintiff held any other position than as described herein, and denies all other allegations of paragraph 4.

5. Defendant admits the allegations of paragraph 5.

6. Defendant denies that the basic written agreement effective July 1, 1936 was operative after September 1, 1949, but admits the other allegations of paragraph 6.

7. Defendant admits that defendant and the Union made a collateral agreement on June 18, 1942, effective July 1, 1942, under which certain classes of "non-mechanics" in the carmen craft could be temporarily advanced to service as mechanics (carmen), when qualified mechanics were not available, and further admits that this agreement was effective until superseded on August 1, 1953 by an agreement dated December 7, 1953. Defendant denies all other allegations of paragraph 7.

8. Defendant admits that on August 23, 1951, plaintiff was advanced from carman helper to "temporary carman" pursuant to the 1942 agreement, and continued in that position until October 23, 1951, when he left for the Armed Forces. Defendant further admits that from August 23, 1951 until October 23, 1951, plaintiff performed, as a temporary carman, such work of a carman as he was capable of, and at carman pay, but he held only a carman helper seniority, all as provided in the 1942 agreement. Defendant denies all other allegations of paragraph 8.

9. Defendant denies all allegations of paragraph 9.

10. Defendant admits that before plaintiff could acquire carman's seniority under the 1942 agreement, the superseding agreement of December 7, 1953 was adopted effective on August 1, 1953. Defendant further admits that the 1953 agreement provided for advancement of non-mechanics to temporary carmen, under certain conditions, and for the listing of present and future temporary carmen by date of upgrading; that under the said contract, a helper so

advanced to temporary carman retains his helper seniority; but works and is paid as a carman; that on completion of 1,040 days work as carman, "he shall be considered as a qualified carman" and "will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1,040 days of service as such and relinquish his seniority as helper. If he fails to do so, he will return to status of helper." Defendant denies all other allegations in paragraph 10.

11. Defendant admits that between his upgrading to temporary carman on August 23, 1951 and October 23, 1951 when he left for military service, plaintiff had a right to work as a carman on every day that carman work was available to temporary carmen, on the same seniority roster, upgraded after August 23, 1951, and that plaintiff worked as a carman on substantially every day when carman work was available to him under the aforesaid rule until he left for military service. Defendant denies all other allegations in paragraph 11.

12. Defendant is without knowledge as to the truth of the plaintiff's allegation that he was honorably discharged from military service on June 2, 1953, and that he otherwise met all of the requirements of Section 9 of the Act. Defendant admits that on June 11, 1953, plaintiff returned to the active employment of defendant, and was reinstated as a temporary carman with a carman helper's seniority.

13. Defendant admits that if plaintiff had not been in military service between October 23, 1951 and June 11, 1953, he would have had the same priority for carman work as admitted in the answer to paragraph 11, and that he would probably have worked on substantially every day when carman work would have been available to him under the provisions of the 1942 agreement. Defendant denies all other allegations in paragraph 13.

14. Defendant admits that between June 11, 1953 and the date when the upgrading list was established pursuant to the December 7, 1953 agreement, plaintiff had the same priority for carman work as is admitted in paragraph 11 hereof, and that he worked as a carman on substantially

every day when carman work was available to him. Defendant denies all other allegations in paragraph 14.

15. Defendant admits that under the terms of the December 7, 1953 agreement, plaintiff's right to do carman's work, as between him and other temporary carmen, depended upon the date of upgrading as established by the upgrading list. Defendant admits that plaintiff worked as a carman on substantially every day on which his date of upgrading gave him the right to work as a carman. Defendant denies all other allegations of paragraph 15.

16. Defendant admits the allegations in paragraph 16.

17. Defendant admits that if plaintiff had not been in military service, he would probably have completed his 1,040 days of carman work before December 25, 1957, but defendant is without knowledge as to the truth of the other allegations in paragraph 17, and, therefore, denies the same.

18. Defendant is without knowledge as to the truth of the allegations in paragraph 19, and, therefore, denies same.

19. Defendant admits that if plaintiff had not been on leave of absence and in military service, he could, and probably would, have completed 1,040 days of carman work before December 24, 1957, and that he could, and probably would, have elected carman's seniority upon completion of his 1,040 days, but defendant denies that plaintiff had any right to elect such seniority at any time before completion of 1,040 days of actual work as a carman, and denies all other allegations of paragraph 19.

20. Defendant admits that it has refused to grant any adjustment of plaintiff's carman's seniority because of his military service, but defendant denies all other allegations in paragraph 20.

Stipulation

(Filed in U.S. District Court May 12, 1960)

The parties hereto hereby agree that the following stipulation of facts may be considered by the Court as evidence in these cases. The parties hereto specifically reserve the right to introduce and offer such additional oral or written evidence as they may deem necessary.

1. Plaintiff herein at all relevant times have been, and are, employees of the defendant within the craft or class known as carman, and, as such, have been, and are, represented by the Brotherhood Railway Carmen of America, the duly designated collective bargaining representative of such employees as provided by the Railway Labor Act, (45 U. S. C. A. 151 to 164). Said Brotherhood is hereafter referred to as the "Union."

2. At all relevant times, there have existed for employees within the carman craft a series of written labor agreements and amendments thereto, negotiated by the Union for and on behalf of such employees on the defendant railroad, which agreements, hereafter identified, have been executed by the Union for the employees and by carrier's bargaining representatives for the defendant.

3. A basic written agreement executed by the defendant and the Union became effective July 1, 1936, and remained in effect thereafter until September 1, 1949. A copy of the said basic agreement is attached hereto, marked Exhibit A.

4. A collateral agreement, sometimes referred to as Decision No. SC-88-1, was executed by the defendant and the Union on June 18, 1942, effective July 1, 1942, copy of which is attached hereto, marked Exhibit J. Said agreement was supplemented on February 1, 1943 by additions to Section 2 and 9, which supplement is included in Exhibit B. This agreement or supplement remained in effect until superseded on August 1, 1953 by the agreement referred to in paragraph 6.

5. The basic written agreement of July 1, 1936, identified as Exhibit A, was superseded by another basic agreement, effective September 1, 1949. A copy of the September 1,

1949 agreement, which is currently in effect, is attached hereto, marked Exhibit C.

6. A collateral agreement was executed on December 7, 1953, effective as of August 1, 1953, which agreement superseded the previous collateral agreement referred to in paragraph 4. A copy of the 1953 collateral agreement, entitled Memorandum Agreement, is attached hereto, marked Exhibit D. This agreement is currently in effect.

7. The agreement referred to in paragraph 6 was supplemented by agreement executed on November 15, 1956, which supplement is attached hereto, marked Exhibit E.

8. Plaintiff Donald I. Tilton was first employed by the defendant as a carman helper at its yards in Kansas City, Missouri, on July 13, 1949.

9. On April 10, 1950, plaintiff Tilton was temporarily advanced or "up-graded" to service as a carman mechanic. Thereafter he performed such carman work as he was capable of for a total of 145 days until, on October 12, 1950, he left his employment to enter military service as a result of a call to active duty from the Reserves.

10. Attached hereto as Exhibit F are true copies of Plaintiff Tilton's work records as maintained by the defendant. These work records show the total number of days Plaintiff Tilton worked as a carman mechanic each month during the period, both prior to and after his military service, that he was employed by defendant as a temporarily advanced carman mechanic.

11. Plaintiff Tilton satisfactorily completed his active military service on December 23, 1951, received a certificate to that effect, and, upon application, was reemployed by defendant on January 2, 1952 as a carman helper, temporarily advanced as a carman mechanic.

12. Pursuant to the collateral agreement of December 7, 1953, identified as Exhibit D, a list of men advanced temporarily to service as carmen mechanics in the yards at Kansas City was compiled, which list is attached hereto, marked Exhibit C.

13. Attached hereto and marked Exhibits H-1 through H-10 are correct copies of the seniority rosters of carmen

helpers and carmen in the defendant's Kansas City yards for the years 1951 to 1960. Commencing with the 1958 roster, pursuant to agreement between defendant and members of the carmen craft represented by the Union, the seniority rosters for all points in the Kansas City Terminal Division were consolidated. These included the Kansas City yards (indicated by the number "6" on the roster) and the diesel facilities (indicated by the number "4" on the roster).

14. As shown on Exhibit F, Tilton completed 1040 days' work as a carman mechanic on August 27, 1956, and upon notification thereof by defendant, immediately surrendered his seniority as a carman helper and elected carman mechanic's seniority, pursuant to the provisions of Exhibit D. Defendant thereupon accorded Tilton a carman mechanic's seniority date of August 28, 1956.

15. Plaintiff Guy L. McClearn was first employed by the defendant as a carman helper on May 24, 1950 at its 21st Street yards in St. Louis, Missouri.

16. On August 23, 1951, Plaintiff McClearn was temporarily advanced or "up-graded" to service as a carman mechanic. Thereafter, he performed such carman work as he was capable of for a total of 21 days, until October 23, 1951 when he left his employment to enter military service.

17. Attached hereto as Exhibit I are true copies of Plaintiff McClearn's work records as maintained by the defendant. These work records show the total number of days Plaintiff McClearn worked as a temporary carman mechanic each month during the period, both prior to and after his military service, that he was employed by defendant as a temporarily advanced carman mechanic.

18. Plaintiff McClearn satisfactorily completed his active military service in June, 1953, received a certificate to that effect, and upon application, was reemployed by defendant on June 11, 1953 as a carman helper temporarily advanced as a carman mechanic.

19. Pursuant to the collateral agreement of December 7, 1953, (Exhibit D) a list of men advanced temporarily to

service as carman mechanic in the 21st Street yards, St. Louis, was compiled, which list is attached, marked Exhibit J.

20. As shown in Exhibit I, McClearn completed 1040 days' work as a temporarily advanced carman mechanic on December 24, 1957, and, upon notification thereof by defendant, immediately surrendered his seniority as a carman helper and elected carman mechanic's seniority. Defendant thereupon accorded McClearn a carman mechanic's seniority date of December 25, 1957, pursuant to the provisions of Exhibit D.

21. Attached hereto and marked Exhibits K-1 to K-10 are correct copies of the seniority rosters of carmen helpers and carmen in the defendant's 21st Street yards in St. Louis for the years 1951 to 1960, inclusive. Prior to 1959, employees in the carman craft had what is known as point seniority, which means that their seniority was limited to the particular yard or shop at which they were working. However, commencing with the 1959 roster, and pursuant to an agreement between the defendant and members of the craft represented by the Union, the seniority rosters for all points in the St. Louis Terminal Division were consolidated. These points were the 21st Street yards, Rankin tract coach yard, Lesparence Street yards, Dupo yard, Ewing Avenue diesel facility, and Carondelet yards.

22. Plaintiff Wilfred I. Beck, Jr., was first employed by the defendant as a carman helper at its yards in Alexandria, Louisiana, on May 12, 1950.

23. On October 12, 1951, Plaintiff Beck was temporarily advanced or "up-graded" to service as a carman mechanic. Thereafter, he performed such carman work as he was capable of for a total of 851 days until on March 1, 1955, he left his employment to enter military service, pursuant to an order to report for induction.

24. Attached hereto as Exhibit L are true copies of Plaintiff Beck's work records as maintained by the defendant. These work records show the total number of days Plaintiff Beck worked as a carman mechanic each month during the period, both prior to and after his mili-

tary service, that he was employed by defendant as a temporarily advanced carman mechanic.

25. Plaintiff Beck satisfactorily completed his active military service in March, 1957, received a certificate to that effect, and upon application, was reemployed by defendant as a carman helper temporarily advanced as a carman mechanic under the provisions of the collateral agreement, dated December 7, 1953, Exhibit D.

26. Pursuant to the collateral agreement of December 7, 1953, identified as Exhibit D, a list of men advanced temporarily to service as carman mechanics in the yards at Alexandria, Louisiana, was compiled, which list is attached hereto, marked Exhibit M.

27. Attached hereto and marked Exhibits N-1 through N-6 are correct copies of the seniority rosters of carmen helpers and carmen in the defendant's yards at Alexandria for the years 1955 through 1960.

28. As shown in Exhibit L, Plaintiff Beck completed 1040 days of work as a carman mechanic on December 5, 1957, and upon notification thereof by defendant, surrendered his seniority as a carman helper on December 13, and elected a carman mechanic's seniority, pursuant to the provisions of Exhibit D. Defendant thereupon accorded Beck a carman mechanic's seniority date of December 5, 1957.

29. Under the provisions of the collateral agreement identified as Exhibit D, persons are selected for upgrading in accordance with Section 1 of that agreement, and are placed on a list of temporarily advanced carmen in the order of their date of upgrading. (Persons upgraded prior to the effective date of this agreement were also placed on such list, according to their original date of upgrading.) Carman mechanic's work is assigned to temporarily advanced carmen in the order of date of upgrading, and is paid for at carman mechanic's rates, although helper seniority is retained and no carman seniority is acquired. Upon the completion of 1040 days' work as a carman, the temporarily advanced carman is required to make his choice, in writing, to acquire a carman mechanic's seniority date as of the completion of the 1040 days and relinquish his

seniority as helper. If he fails to do so, he will return to his status as a carman helper and does not acquire seniority as carman. All three plaintiffs here involved, Tilton, Beck and McClearn, promptly elected mechanic's seniority upon the completion of 1040 days' service as carman.

30. Under the collateral agreements identified above as Exhibits B and D, as between carman helpers temporarily advanced, carman mechanic's work was assigned to such helpers in the order of their date of upgrading or advancement.

31. Plaintiff Tilton did not, on April 10, 1953 (the third anniversary of his temporary advancement to carman), or at any time prior to August 28, 1956 relinquish his seniority rights as a carman helper, nor did he file any protest in writing with respect to his seniority and classification as shown on the seniority rosters posted at Kansas City in January, 1954, January, 1955, or within 30 days after the posting of the January, 1956 roster.

32. Plaintiff Beck did not, on October 12, 1954 (the third anniversary of his temporary advancement to carman), or at any time prior to December 13, 1957 relinquish his seniority rights as a carman helper and elect a carman's seniority.

33. Plaintiff McClearn did not, on August 23, 1954 (the third anniversary of his temporary advancement to carman), or at any time prior to December 25, 1957 relinquish his seniority as a carman helper and elect a carman's seniority.

[It was also stipulated that defendant's answers could be corrected by interlineation to conform to the facts set forth in this stipulation.]

Exhibit D

Memorandum Agreement

The Carrier having made election to make Article III of agreement signed at New York on the fourth day of June, 1953, by the Eastern, Western and Southeastern Carriers' Conference Committees and the General President of the Brotherhood Railway Carmen of America, effective [August 1, 1953—See Stipulation, ¶ 6] as prescribed therein, it is agreed that an understanding should be reached on the manner in which this Article III will be applied. It is also agreed that the upgrading provisions of agreement known as SC-88-1, dated June 18, 1942, are superseded by this agreement.

It Is Therefore Agreed:

Section 1.

When the Carrier is unable to employ qualified carmen, truckmen, apprentices and helpers will be advanced to carmen as prescribed by this agreement.

Advancements will be made in the following order and manner:

(a) Truckmen employed at the point where carmen are needed will be given first opportunity for advancement. Truckmen will, at the time, indicate their option in writing. Truckmen electing to be advanced will, in their written acceptance of advancement, state whether they desire to acquire seniority date as carman as of the date advanced and relinquished seniority as truckman, or if they desire temporary advancement without acquiring carman's seniority and retain seniority as truckman.

(Truckmen who have previously been advanced to carman and who are working as such on the effective date of this agrement will indicate in writing, within 10 days, whether they desire to acquire seniority date as carman as of the effective

date of this agreement and relinquish seniority as truckman, or if they wish to be considered as temporarily advanced without acquiring seniority as carman and retain seniority as truckman.)

(b) When additional carmen are needed, regular apprentices employed at the point where carmen are needed, who have served 520 days or more of actual service of their apprenticeship, will be advanced. Apprentices with the greatest number of days of apprentice training to their credit will be the first advanced.

(c) If there is still need for carmen, helper apprentices employed at the point where carmen are needed will then be advanced. Helper apprentices with the greatest number of days of apprentice training to their credit will be the first advanced.

(d) Should the need for carmen not be met by the advancement of truckmen and apprentices, helpers employed at the point where carmen are needed, who are qualified for advancement, will be so advanced. First choice to be made from helpers with two years or more of service as such. Master Mechanic or Superintendent of Shops and Local Committee will jointly agree on the helpers to be advanced. In the event there is disagreement on one or more helpers, other helpers on which agreement is reached will be advanced so that the immediate need for carmen will be filled and the names of the helpers not agreed on as qualified for advancement will be referred to the General Chairman and Chief Mechanical Officer for prompt determination of the qualifications of the men involved. If it is determined that the helper or helpers in dispute should be advanced, they will take their places on the upgraded list as of the date they would have been advanced had the dispute not arisen. There will be no claims of any nature made by any employe represented by the Brotherhood Railway Carmen of

America by reason of dispute or disputes concerning the individual helpers to be advanced.

(e) If the foregoing does not fill the need for additional carmen, men having mechanical experience will be employed as helpers and may immediately be advanced to carman and will thereafter come under the provisions of this agreement.

Section 2.

A list of all men advanced temporarily as carman will be compiled and maintained. Men will be listed on the same in the order of their upgrading and the date of upgrading will be shown opposite the name of each man thereon. The listing of the dates is not to be considered as a seniority date. When force reductions are made, the demotion from carman shall be in the reverse order of upgrading as shown on the upgraded list, the last men upgraded to be the first men demoted.

Men temporarily advanced to carmen prior to the effective date of this agreement will be included in the upgraded list provided for above and will retain their places on such list in the same manner as men advanced after the effective date of this agreement.

Section 3.

(a) Apprentices and helper apprentices temporarily advanced will receive one day of credit of apprentice training for each day worked as a carman toward completion of apprenticeship.

(b) A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not

again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper.

Section 4.

Apprentices and helpers returning from the armed services, whose seniority has been protected as provided for by the laws of the United States and by agreement between the Organization and the Carrier will be governed by the following:

(a) Apprentices who were upgraded, and whose names were carried on the upgraded list at the time they entered the armed services, will retain that position on the upgraded list.

(b) Apprentices who had not been upgraded at the time they entered the armed services will be given a position on the upgraded list, based on their days of actual service as compared with days of actual service of other upgraded apprentices, as of the date they entered the armed services as provided for under Section 1 (b) and (c) of this agreement.

(c) Helpers upgraded to carmen will retain their position on the list of upgraded men if they enter the armed services.

Section 5.

Upgraded men will be permitted to make application for vacancies to positions as carmen and if there are no bids received from men who hold seniority as carmen, the upgraded men making application will be assigned based on their position on the upgraded list.

Section 6.

In the application of Rule 37 of the agreement between the Carrier and System Federation No. 2, effective Sep-

tember 1, 1949, governing the ratio of apprentices to mechanics, such apprentices and helpers who are temporarily advanced to service as carmen shall not be considered as mechanics in the calculation of the ratio of apprentices to mechanics. Apprentices, either regular or helper, upgraded to serve as mechanics will be considered as apprentices in the application of Rule 37 until such time as they have completed the necessary days of apprenticeship to qualify them as mechanics.

This agreement shall become effective as of August 1, 1953 and shall remain in effect until changed or abrogated in accordance with the provisions of Section 6 of the Railway Labor Act as amended.

EXHIBIT J

The following is list of men upgraded temporarily to carmen at 21st Street:

Name	Date Upgraded
F. Wilson Jr.	4-12-1950
N. W. Cliffe	12- 1-1950
M. Ludwig	4- 5-1951
C. E. McBride	4- 7-1951
G. McClearn	8-23-1951
M. Schaefer	10-10-1951
L. Rodgers	10-31-1951
J. Cotton	1-24-1952
W. Edwards	3-28-1952
M. M. Batey	6-30-1952
T. K. Cummins	7-10-1952
J. Ferrarie	8-27-1952
C. C. Cunningham	9-17-1952
P. Sullivan	11-26-1952
T. W. Isaac	1- 3-1953
H. Wisdom	2- 5-1953
P. Trusick	4-21-1953
W. Becker	4-29-1953

EXHIBIT K (Part)

Section 17, page 1

Seniority Roster of Car Department Employes Under the Jurisdiction of the Master Mechanic at St. Louis as of January 1, 1958

21st Street Car Department

Division 6—Carmen

Name	Soc. Sec. No.	Seniority	Work No.
1. O'Malley, James J.	702-16-3186	10- 1-1922	825
2. Harper, Thomas J.	702-16-3586	12-28-1924	826
3. Fancher, Herbert L. (4-man)	702-16-3655	2- 2-1927	
4. Scott, R. A. (wrecker 4-man)	702-16-3587	7- 2-1929	
5. McKeon, Thos. F. (4-man)	702-16-3519	5-18-1931	
6. Meinhardt, R. C. (4-man)	702-16-3638	12-12-1934	
7. Gibbs, Charley	702-16-3713	1-16-1941	827
8. Cummings, T. A. (Car 4-man)	702-16-3715	1-16-1941	
9. Edwards, Carl B.	702-16-3731	11-27-1941	828
10. Zittel, Jerome (Asst. 4-man)	702-16-3644	2-24-1943	
11. Briley, Carter J.	702-16-3649	3- 2-1943	829
12. McCormack, C. F. (Pacific, Mo.)	702-16-3631	5-29-1943	
13. Freeman, Tom James	487-22-9889	3-15-1944	855
14. Tatum, Sollie W.	702-16-3648	6-21-1944	830
15. Dames, Fred W.	703-03-9711	12-13-1944	831
16. Johnston, Clyde W.	499-05-1272	1-21-1947	856
17. Wilson, Floyd	702-18-3225	11-10-1948	857
18. Capasso, Vincent	702-16-3894	11-10-1948	858
19. Gilley, Carroll	702-16-3647	8-15-1949	859
20. Richardson, Noel	489-18-8229	8-16-1949	832
21. Bolobraudic, E. D.	327-12-9103	11- 1-1949	860
22. Ruth, Clarence	490-03-1874	1-19-1951	833
23. Hantack, Joseph	702-18-6251	8- 1-1953	834
24. Wenzel, Wm. F.	431-20-6146	10-15-1953	861
25. McMillion, Lorn K.	500-28-9767	10-17-1953	835
26. Williams, G. W.	487-18-5737	10-18-1953	836
27. Case, James W.	489-18-7024	10-19-1953	862
28. Harper, Lawson W.	444-05-5280	1-17-1954	863
29. Smith, Carl V.	359-03-5017	4- 1-1954	837
30. Jackson, Francis M.	338-14-9060	4- 3-1954	838
31. Copeland, David J.	496-28-8237	4- 8-1954	839
32. Baker, Calvin E.	498-22-1494	5-19-1954	840
33. Mueller, Ralph H.	353-24-3172	7- 2-1954	864
34. Cliffe, Martin W.	495-28-0472	11- 5-1954	841
35. McBride, Clarence E.	346-14-4806	8-20-1955	842
36. Mezo, Paul	331-18-8526	9- 3-1955	843
37. Schaefer, Russel J.	494-01-6481	4-20-1956	844
38. Bender, W. W.	498-09-0538	6-19-1956	865
39. Rogers, Lloyd	351-16-5947	7-26-1956	866
40. Cotton, John L.	344-14-2632	1- 6-1957	845
41. Edwards, W. E.	490-24-5559	6-14-1957	847
42. Leonarti, Otis	500-10-7855	8-19-1957	869
43. Monsees, Oscar J.	491-07-7623	11-25-1957	868
44. McClearn, Guy H.	495-14-7369	12-25-1957	846
45. Whitfield, W. J.	430-01-7874	1- 2-1958	894
46. LeGrand, W. R.	351-03-1855	1- 5-1958	919
47. Derrington, C. W.	499-01-5478	1- 5-1958	918
48. LeGrand, W. L.	488-09-4746	1- 7-1955	917
49. Colcher, Clarence	490-01-3807	1- 7-1958	916

Exhibit K (Part) (Continued)

21st Street Car Department—(Continued)
Division No. 6, Carmen-Helpers

Name	Soc. Sec. No.	Seniority	Work No.
1. Ludwig, Melvin	494-03-7666	1-19-1943	878
2. Trusik, Paul	702-16-3632	5- 6-1943	872
3. Becker, Walter C.	702-16-3886	7-16-1943	854
4. Castleberry, Jos. (col)	491-12-6118	1-21-1944	856
5. Hawkins, Henry (col)	436-16-0128	2- 8-1944	859
6. Nash, Edgar (col)	491-16-7907	7-20-1944	862
7. Bagby, E.	702-16-3891	4- 7-1947	876
8. Shafer, Russell J. (Temp. Prom.)	494-01-6481	4- 8-1947	864
9. Ferririo, John	490-03-6798	6- 7-1948	850
10. McBride, Clarence (tem; Prom.)	346-14-4806	10-31-1949	839
11. Batey, Merrion M.	489-24-9562	4-18-1950	841
12. Cummins, Timothy K.	357-24-2077	4-19-1950	845
13. McClearn, Guy H.	495-14-7369	5-24-1950	837
14. Bruns, Robert P.	495-24-1206	7-12-1950	disabled
15. Cunningham, Calvin	486-03-5341	8-17-1950	826
16. Pierce, William E.	493-24-7874	9-15-1950	U.S.A.F.
17. Edwards, Wilber E.	490-24-5559	11-27-1950	824
18. Rogers, Lloyd D. (temp. Prom.)	351-16-5947	1-17-1951	827
19. Cotton, J. L. (temp. Pro.)	344-14-2632	2-15-1951	825
20. Tribble, Bobbie Lee	431-50-6949	5-22-1951	828
21. Lipski, Richard L.	499-28-4702	7- 3-1951	
22. Loraine, Lawrence E.	498-22-4141	10-23-1951	
23. Wisdom, Herbert J.	487-18-5243	11-13-1951	
24. Isaac, Thomas W.	432-40-1779	11-26-1951	
25. Holifield, William C.	489-28-5074	11-26-1951	
26. Angel, Robert	496-09-6523	4-24-1952	
27. Berding, M. J.	498-01-9847	4-29-1952	
28. Logan, G. W. (col)	428-20-5097	5- 5-1952	
29. Coplen, Eugene W.	720-12-5052	7-29-1952	
30. Chitwood, Vernon B.	496-32-8633	8-10-1952	
31. Callahan, Russell E.	487-18-0630	9- 9-1952	
32. Horn, Robert E.	490-26-1686	1- 7-1953	
33. Linam, Geo. A.	415-36-3320	1-13-1953	
34. Rosson, Wm. E.	414-36-2754	4- 3-1953	
35. Morgan, Victor	412-12-2375	5-20-1953	
36. Hays, Cornelius	294-03-5944	5-26-1953	
37. Gipson, Wess H.	431-20-3734	5-27-1953	
38. Sullivan, Theodore	434-28-5312	7- 2-1953	
39. Lackey, Leonard C.	441-03-7771	7-29-1953	
40. Hornbeck, Albert	498-10-1352	8-17-1953	
41. Keys, Albert Jr.	500-30-1341	8-25-1953	
42. Haggard, Harold M.	486-18-6429	9-24-1953	

[fol. 54] Transcript of Trial Proceedings

(Tr. 5) Mr. Mahlman: It is further stipulated that the upgrading date of March 1, 1950, for J. I. Smith, who follows plaintiff Tilton on the upgrading list of the Kansas City Terminal Division, Exhibit G, was in error and should have been April 12, 1950.

It is further stipulated that plaintiff Beck's work record, Exhibit L, is in error with respect to the date of upgrading which is shown as October 19, 1950, and that the actual date of his upgrading was October 12, 1951.

Is that correct?

Mr. Yost: That is correct.

[Testimony of Plaintiff Beck]

Direct Examination

(Tr. 14) Mr. Mahlman: I beg your pardon.

It's been stipulated that you were upgraded on October 12, 1951.

A. Yes, sir.

Q. Would you tell the court why you took setup status, why you decided to become a setup carman?

(Tr. 15) A. Well, when I hired out I thought maybe I could go ahead later on and take the carman job and be a carman and better myself.

Q. In what respect would that better you?

A. Well, it's better working, more higher pay.

Q. Would you tell us what plans you had at that time for your life's career?

[fol. 55] A. Railroad.

Q. Did you intend to work for the railroad as your life's work?

A. Right.

Q. Tell us what is the more desirable type of work, work of a carman or work of a helper?

A. Work of a carman.

Q. Did that in any way influence your decision to elect the carman status?

A. Right.

Q. Have you ever considered abandoning that status for any reason?

A. Not unless it's a further promotion higher.

Q. While you were absent in military service, Mr. Beck, what plans did you make about getting a civilian job when you got out of military service?

A. I didn't make no plans at all. I already had my job. I just went back to work for Missouri Pacific.

(Tr. 16) Q. Did you want to return to the Missouri Pacific?

A. That's where I had my seniority established.

Q. Would you tell us whether you have ever turned down any chances to do carman's work since you have been employed by the Missouri Pacific?

A. No.

• • • • • • •

(Tr. 18) Q. Mr. Beck, let me ask you this: Do you know from your own experience at Louisiana of any man who had been set up from helper to setup carman and who was downgraded back to helper for any reason other than the reduction in force?

A. No.

• • • • • •

[fol. 56]

(Tr. 20) DONALD I. TILTON

being produced, sworn and examined in behalf of the plaintiffs, testified as follows:

Direct examination

By. Mr. Mahlman:

Q. Would you state your name and address, please?

A. Donald I. Tilton, 330 North Oakley, North Kansas City, Missouri.

Q. Mr. Tilton, it's been stipulated that you were up-

graded from a helper to a setup carman at Kansas City on April 10, 1950. I wish you would tell the court why you elected to take setup carman status.

A. Well, about all my family have been carman and I wanted to get in that category myself. That is what I always wanted all my life, since I was a young kid.

Q. In your view was that a more satisfactory job or better job than a helper?

A. Yes, sir, it's a much better job.

Q. Would you tell us why?

A. Well, it's a lot cleaner job and it's more—you have to use your intelligence a little bit more than you do a helper's job. It's a more——

[fol. 57] Q. Have you ever considered giving any thought to abandoning this line of work and looking for something else?

A. No, sir.

(Tr. 21) Q. At the time you were absent in military service, what plans did you make about going to work when you got out of the service and were a civilian?

A. I took a leave of absence and I paid fifty cents a month to the union all the time I was in the service.

Q. Had you any intention of going to work elsewhere than for the railroad?

A. No, sir.

Q. Why did you want to return to the railroad?

A. I had my seniority established there.

Q. Have you ever turned down any chances to do carman work?

A. No, sir.

* * * * * *

Tilton—Redirect

By Mr. Mahlman:

(Tr. 27) Q. Did you ever have any complaints about your work?

A. Never did, no, sir.

* * * * * *

(Tr. 29) GUY H. MC CLEARN, JR.,

being produced, sworn and examined in behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Mahlman:

Q. Would you state your name and address, please?

A. Guy McClearn, 3222 Caroline, St. Louis, Missouri.

Q. Mr. McClearn, it's been stipulated that you were upgraded from a helper to a setup carman on August 23, 1951. I wish you would tell the court why you decided to take the job of setup carman rather than remain as a helper.

[fol. 58] A. Well, as a helper you were restricted in some works, whereas a carman you gain more knowledge of the job, which you would like to get promoted to.

Q. Is there any difference in pay?

A. Yes, sir.

Q. At the time you made this decision, Mr. McClearn, what plans did you have for your life's career?

A. Well, I got a leave of absence when I got called back in the army and I was planning on coming back, railroad.

Q. At the time you were set up from helper to carman, did you have any plans about your life's work at that time?

(Tr. 30) A. Well, to continue with the railroad.

Q. Have you ever considered abandoning your railroad job or your carman job?

A. No, sir.

Q. While you were in military service, did you make any plans to the contrary?

A. No, sir.

Q. What plans did you make while you were gone?

A. Well, as I say, I got a leave of absence; I made plans to come back and return to my job.

Q. Why did you want to return to the job with the railroad?

A. Well, it's a pretty good job; I like railroad work.

Q. Have you ever turned down any chances to do carman

work while you have been employed by the Missouri Pacific?

A. No, sir.

* * * * *

[fol. 59] [Testimony of Smith, Chief Personnel Officer of Defendant]

* * * * *

Direct Examination

By Mr. Yost:

(Tr. 44) Mr. Smith: * * * and they were given a further incentive under that agreement so that after actually having performed the required number of days set up in that agreement, which was three years in that agreement of '42, to qualify them as a mechanic, then they did not automatically acquire a seniority date nor automatically relinquish a seniority date as a helper, but *they* were permitted an election at that time, either to acquire a date then as a mechanic or to return to the status of a helper and retain their seniority as a helper, which in some cases was more desirable than taking the mechanic's date.

Q. All right, then. To summarize your statement then because of the shortage of qualified carmen mechanics, and the shortage of apprentices, who were in the apprentice program, you made an agreement with the Brotherhood of Railroad Carmen that helpers could be upgraded and work as a carman, and then if they completed three years of actual work in that capacity they could acquire, if they so chose, carmen's seniority date; is that substantially what you said here?

A. Yes.

(Tr. 45) Q. Now, this 3-year work requirement meant three years of actual work, is that correct?

A. That is true.

Q. As an upgraded helper?

A. Yes, we required the actual work and actually kept

records of days worked in order to make sure that they had the required time.

The Court: How much was that time?

The Witness: Three years under the '42 agreement.

By Mr. Yost:

Q. It was 1040 days under the '53. What was the fact if a man was absent for any reason, such as strikes or personal injuries or was granted leave of absence for some personal reason, did he have to make up that time in order [fol. 60] to complete his 3-year service?

A. Well, he had to actually work the days. We didn't even count the days he was off in vacation in computing the number of days to constitute the year.

Q. In other words, a man was not entitled to a carman's seniority date on the third anniversary of his date of upgrade just because three years had elapsed?

A. That is true. He had to have three years, the equivalent of three years in working days, compensable work.

Q. Now, how was it decided, who made the decision that a man was to be upgraded from helper to a setup carman under

(Tr. 46) that '42 agreement?

A. There was a provision in there that these men would be selected by mutual agreement between the local supervision and the local committee of the organization, it being felt, of course, like we do in many agreements, where it is necessary for people to know individuals and their temperament and capabilities and so forth, we leave that with the people they are living with to make the selection, and that is the reason that was done.

Q. Were any qualifications set up in the agreement for that upgrading?

A. Only with respect to the amount of time in service, giving first, second or third preference down the line.

Q. Now, a man who had been upgraded by that process, was he considered to be a qualified carman after he had been upgraded?

A. We considered him a qualified man after he had finished the required time of working as a carman, yes.

[fol. 61] Q. By virtue of the specific terms of the agreement?

A. That is correct.

(Tr. 48) Q. After a man had completed his time under this '42 agreement, was he automatically given a carman's seniority date?

A. No, sir.

Q. What did he have to do first?

A. He had to make his own decision about it, as to whether he wanted to enjoy his date as a helper, which obviously was much earlier, or to acquire a new date as a mechanic, and look over the situation to determine in his own judgment as to what work might be available for him so he would be on the payroll, either as a helper or as a mechanic.

(Tr. 49) Mr. Yost: * * * All right, Mr. Smith, do you know of actual instances where men have refused to accept the carman's seniority date after completing their required time under the '42 agreement?

A. I probably couldn't name any individuals, Mr. Yost, but it is common knowledge that it has been done, and some of the reasons for which I know it isn't because they have had to upgrade some other men, because those men didn't take the carman's date, set themselves back.

Q. Now, take a man who has been upgraded under the '42 agreement, or even under the '53 agreement, and he is working as a carman, if at any time it should be proven by his work that he was not competent to continue with that work, is there any process or procedure or rules for downgrading him back to helper?

A. Nothing specific in the agreements at all, Mr. Yost, but that was handled by the local officers and the local committeeman, if they found a man who wasn't functioning, they would be able to get him, and he would step back.

[fol. 62]

(Tr. 54) Q. Now, will you tell us the background of that agreement? What led up to the 1953 upgrading agreement?

A. Well, there had been a movement which was on a national basis for certain adjustments in rates for carmen and proposals and counterproposals from the different railroads, and the carman's organization, and it finally ended up in a national agreement made by representatives of the carrier and the organization in June; in fact, it was the 4th of June, 1953, in New York City, and that agreement, among other things, provided for the upgrading of men and the actual employment of men if upgrading failed as men skilled in the handling of tools, so that the railroads could get

(Tr. 55) enough mechanics. So it was necessary to make an implementing agreement on the railroad which we did make in 1953, and gave it an effective date of August 1st, but didn't actually sign it until the 7th day of December.

Q. Did the Korean war result in a shortage of mechanics?

A. I don't know what caused the shortage, Mr. Yost, but even today we still have a need for mechanics.

Q. This 1953 agreement is still in effect, then?

A. Yes, sir.

Q. Because of the continued shortage of mechanics?

A. Yes, sir.

Q. Now, with respect to any man who had been upgraded prior to the effective date of the '53 agreement, what was to be done with those men under that agreement?

A. Well, we picked those men up, anyone who was upgraded at the time, and put them on the upgraded list and let them then have an opportunity to make an election at the completion of four years of service or 1040 work days, make an election to take a mechanic's date or go back to the helper job.

Q. Were all the men placed on this upgraded list in the order of their dates of upgrading?

[fol. 63] A. If the agreement provisions were all followed locally, that is what it required.

(Tr. 58) Q. Now, let me ask you under the 1953 agreement if qualified carmen are available to you can they be hired and placed on the seniority list even though you have helpers who might be upgraded?

A. Any time a fully qualified mechanic shows up and can meet our physical standards, and has a good clean record, he is employed immediately, and the one upgraded man is set back.

Q. Now, what are the sources of these fully qualified carmen from which you might hire a new carman?

A. Men who might be cut off at—on some other railroad, and then by terms of an agreement with the organizations, men who might be furloughed

(Tr. 59) mechanics at one point on the railroad in the twelve states could come to the place where there are upgraded men and immediately go to work and the upgraded man goes back to a helper.

Q. Now, reference was made to an agreement that we have on the Missouri Pacific of giving apprentices who complete their time after return from military service a retroactive seniority date. Do we have such an agreement on the Missouri Pacific?

A. For apprentices?

Q. For apprentices?

A. Yes, sir. Yes, sir.

Q. Can you tell me why we have such an agreement for apprentices?

A. Well, because of the fact that the apprentice has only term seniority and when he finishes h actual time of training he automatically loses that date and automatically acquires a mechanic's date, so we felt that we should make that sort of an agreement for a man who was absent in the military service.

[fol. 64] Q. When was this agreement giving the apprentices an automatic seniority date upon completion of their time, when was that entered into?

A. In the basic agreement it was—I cannot give you the date.

(Tr. 60) The exact date is something about five years ago;

but the principle of it was set up in the upgrading agreements of 1942 and I believe so stated in some paragraph in there.

Q. Now, we have never entered into such agreement for upgraded helpers; why is that?

A. Well, the reason that we have not is because we didn't feel that we had the right, neither the organization nor the carrier, to make that election for a man, because it was his livelihood involved, and he could look the situation over and make his own election, and if we upgraded him and put him in a status the same as an apprentice, we might have a little difficulty in getting him to take it in the first place.

Q. Has the Brotherhood of Railroad Carmen requested us to enter into such an agreement?

A. No, sir.

Q. Now, do helpers have any rights under the basic agreements apart from these two upgrading agreements that we are speaking of, do they have any rights under the basic agreements which are identified as Exhibits A and C to the stipulation to be promoted to carman?

A. I haven't seen those exhibits. I don't know what the exhibits are.

Q. Those are the basic agreements containing all the working rules.

A. If you mean right of promotion of a helper?

(Tr. 61) Q. That's right, is there any rule in there that gives him any right of promotion from helper to carman?

A. No, sir.

• • • •

Smith—Cross

[fol. 65] By Mr. Barnes:

(Tr. 64) Q. Now, you have testified that these men, when they completed their three years or thousand and forty days of work, did not automatically acquire carman seniority. As soon as they made an election, the railroad had no choice but to give them the seniority, did it?

A. Under the '42 agreement?

Q. Under either the '42 agreement or the '53 agreement.

A. That's right.

Q. In other words, as soon as they completed the work requirement, made the election as of that time, they became carmen and drew a seniority date?

A. Correct.

• • • • • •

(Tr. 66) Q. Now, you said that you knew of instances where men had refused to accept a carman date, in other words, he refused to accept seniority as a carman; would that not frequently be due to the fact that they had so much helper seniority that they would almost as soon be assured of work as a carman helper whereas as a carman they would be at the bottom of the list?

A. I think I testified substantially to that.

Q. Wouldn't there also be circumstances where a man, because of age, or physical limitation, might feel that he might be called on to perform work that was beyond his capacity and he therefore would prefer to stay within the more secure area of carman helper?

A. He might find that as a reason for making a determination, yes; that is up to him.

• • • • • •

(Tr. 68) Mr. Barnes: What you do find, then, is that men accept the set back?

A. Yes.

Q. And that you do not know of an instance where a [fol. 66] man against his will, now, refused to accept a set back has been set back?

A. No, because if it was against his will he would have a grievance procedure to follow and I would probably know about that.

Q. So to your knowledge there has been no such instance?

A. Of where a man has objected to being set back, no.

Q. Now, if I, again, if I understood you correctly, you said that when set up men had been set back, they were

not setback up in accordance with their original upgrading date?

A. According to the 1953 agreement, that is correct.

Q. As between a setup man who had been set back, wouldn't it—and leaving out of parenthesis a journeyman or anything like that, but as between a setup man who had been set back

(Tr. 69) because of a reduction in force, isn't it true that the man with the oldest date of upgrading would get first choice on being set back up?

A. That would be a natural thing to do, yes, sir.

Q. Now, I'm not sure I follow your reasoning, Mr. Smith, when you said, if I can recall correctly, that your reason for not giving the helpers the same sort of a shake that you have given the apprentices—I say helpers, I mean the setup men who advanced from helpers, was that the apprentice lost his term seniority at the completion of his apprenticeship?

A. Automatically.

Q. Automatically, whereas the carman had an opportunity to revert back to helper?

A. Correct.

[fol. 67] Q. Well, now, I can see why you would automatically give an apprentice who completed his apprenticeship a job as a carman because otherwise he's got no place to go, but I don't follow you on making the distinction in retroactivity.

A. Well, here it is. I believe I stated before that we had to make this attractive proposition for a helper to move up into an upgraded status and he would very likely not take, in many instances, an upgraded status if he was going to then be subject to a rule which said that after having served a certain period of time in the upgraded status he would (Tr. 70) automatically lose his helper's date, and automatically acquire a mechanic's date, because that might actually cut him out of his bread and butter.

Q. I think I understand your distinction. One or two more questions, Mr. Smith.

Isn't it a fact that in selecting men for setup, the senior

man as carman helper normally had first choice on the vacancy?

A. No, sir, not always. We discussed this in our negotiations and the reason we left it to the local committee people, there are some men who have spent a lifetime working as a helper, and obviously they would not at all be interested in going up to an upgraded position, and we wouldn't want them to do so, because he wouldn't be able to do the work, and for many reasons, some men may be are working as helpers that might have gotten into the service who couldn't even read and write.

• • • • •

Smith—Redirect

By Mr. Yost:

(Tr. 72) Q. All right, as between two men working as helpers who had equal ability, let us say, was the practice to select the senior man for upgrading?

A. Yes, generally, yes, if he had the same qualifications they would do that.

[fol. 68] Q. All right. As between two men working as helpers who did not have the same ability in the opinion of the local committee and local master mechanic, was the man selected for upgrading who had the greatest ability?

A. That was the general idea of the agreement, making the selection locally by the superintendent and the local representatives of the organization.

(Tr. 73) Q. And in making that selection they could ignore the seniority of the helpers?

A. They could.

• • • • •

(Tr. 74) Q. Mr. Smith, in cross-examination this morning you were asked whether you knew of any names of men who had been upgraded and then subsequently downgraded back to helper, and you said no, you didn't know of any specific names at the time. Now, have you been able to learn of any such instances in our lunch hour today?

A. Yes. During the lunch hour I was able to get ahold of the personal record file of one man who was set back and considered not capable of performing the work.

(Tr. 75) Q. What was that man's name.

A. His name was Albert Hornbeck.

Q. Where did he work?

A. At St. Louis.

Q. Does the record show when he was upgraded?

A. He was upgraded the last time on May 22, 1956, and he was set back on account of not qualified on June 6th of the same year.

* * * * * *

Smith—Recross

[fol. 69] By Mr. Barnes:

(Tr. 76) Q. Mr. Smith, when was Mr. Hornbeck originally set up?

A. Made a little transcript of his full record if you would —if that will answer your question. He was first employed September 11, 1945, as a car helper, but he was furloughed in 1948. Then in 1952 he sought a job and was employed in the maintenance-of-way department as a water service helper, but on August 14, 1953, he then asked to be employed again as a carman helper, and that was granted to him, then he was furloughed again October 29, 1953, because of lack of seniority, then he was recalled to work as a carman helped on July 18, 1953.

(Tr. 77) On March 23, 1956 he was temporarily upgraded to a carman, but he was set back on April 25, 1956, in reduction of force. Then he was recalled or set up again on May 22, 1956, and then disqualified and sent back on June 7, 1956, to a helper.

Q. How many days of service did he have at the time he was set back as a setup carman?

A. The last time?

Q. No, the whole time as setup carman.

A. Take a little computation. It was approximately a month from March 23rd to April 25th, and then from

May 22nd to June 7th, which would be about half a month, a little more than that, so you might say a month and a half all told.

Q. Well, that is calendar time?

A. Calendar time, and I do not have the actual days of work, but there would be a record of him being set back or up, and whether he was laying off or not, I don't know, but in those weeks, six or seven weeks, you would say about thirty-five days.

* * * * * * *

[fol. 70] (Tr. 78) By Mr. Barnes:

Q. Now, Mr. Smith, the last paragraph of Defendant's Exhibit 4 says, as I read it, that Hornbeck agreed that he was satisfied to go back as a helper oiler, which he can handle as an oiler on journal boxes, that he was satisfied to go back?

A. Yes, he said that in writing.

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[Testimony of W. H. Bond, General Chairman of the Carmen on Missouri Pacific R. R.]

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DIRECT EXAMINATION

(Tr. 92) Q. Now, when they had to find men to upgrade in order to get the carmen's work done, did they look for the best qualified man or did they look for the senior man?

A. Well, we like to recognize the principles of seniority very much and we tried to follow that as close as we could. There was, I think, both the carrier and the employees realized that we couldn't say we were going to take everybody. We had the question of age, where a man is sixty years old, he got his time served, he would be on retirement, or you could go to capability, mental or physical, and you had other things. It wasn't like chronic layer off, things like that. They wasn't taking straight seniority.

We tried to observe that as near as possible, and we didn't always agree on it the first time on some of those things, but it was agreed to by both parties under those circumstances.

Q. Well, in other words, if you didn't think a man was qualified to be upgraded, you could turn him down even though he was a senior man, is that right?

A. That's right.

* * * * * *

[fol. 71] (Tr. 94) Mr. Yost: I'm sorry.

Mr. Bond, after a man has been upgraded under the provisions of that '42 agreement or the '53 agreement, is there any procedure for downgrading him back to helper if he proves he isn't competent to continue on with that work?

A. Well, yes. We have had people taken off as upgrading and put back as a helper. This has been tried to be handled on a voluntary basis and explain to them their shortcomings, and I believe only one case has come to the office of the general chairman here since I have been on the job.

* * * * * *

(Tr. 105) Q. (By Mr. Yost) After the completion of the work requirement for promotion to carman under either 1942 agreement or the 1947 arrangement or the 1953 arrangement, was the promotion to carman from upgraded helper automatic at any time upon the completion of their work requirement? Was that automatic?

A. Well, most of them made an election. It says they will make an election to make it. I know of a case or two even after they served their time that it was questioned about their ability and so forth. I don't think—it was left up to the employee, I would say, more. Of course, I would say it's the prerogative of the company on that. It's not automatic, I don't think.

Q. What I'm getting at is, that he wasn't automatic-

ally taken off of the helpers' roster, put on the carmen's roster on the day he completed 1040 days?

A. Oh, the agreement provides how he goes on.

Q. He has to do something in addition to just completing that time, isn't that right? What does he have to do?

A. Well, he would have to make application for the [fol. 72] job and give up his rights as a helper and ask to acquire seniority. You got to make a sacrifice of seniority. It's considered a property right.

(Tr. 106) Q. Did all the men always take that carman seniority and relinquish their helper seniority?

A. No, sir.

Q. Some refused to take that?

A. Yes, sir.

Q. I see. Were there also upgraded helpers who failed to complete their work requirement?

A. You mean failed to get in enough time?

Q. Yes; yes.

A. Well, I have——

Q. For one reason or another?

A. I have the records of the employees I represent as local chairman that was set up in the year 1950, and there's less than half of them that's completed their time right now. We have their names and files right here.

Q. Well what I mean is did some of them, rather than continuing on in the upgraded capacity, did they choose to go back to work as a helper?

A. Yes, we had people set theirs back, yes. That was not in any big number but quite a number at that.

Bond—Cross

By Mr. Barnes:

(Tr. 107) Q. Let me ask you this: What would be your attitude at present if a man, tomorrow, were to complete a thousand and forty days as a setup carman and the company said, "No, no, we're not going to put you on the carman seniority roster," wouldn't you go in there and say, "Well, now, look here, under the agreement you've

got to put him on the seniority roster, under the present agreement"?

[fol. 73] A. Well, I think if we had somebody like that he would be probably so left-handed that they would have something to talk about. I only know of about one instance of that happening.

Q. Yes, Mr.——

A. We're here to represent the people we represent, and the man served his time, unless he had something radically wrong with him, we would insist that he be put on there.

Q. Wouldn't you be violating your agreement if he wasn't put on, if you didn't insist that he be put on? Now I'm not talking about somebody who is, say, halfway (Tr. 108) along in their work requirement. I'm talking about somebody who isn't so left-handed that the company has let him stay on and work a thousand and forty days as a setup requirement. Doesn't your agreement give that man—the word "automatic" has been tossed around, doesn't it give him the automatic right to do one of two things: Take carman seniority or go back to carman helper's lists?

A. It provides for him making a choice there. It's if he——

Q. And the company has nothing to do with that choice?

A. Well, I don't know. We had one fellow up here at my hometown that they—that they raised an objection on, and he's quite a ways off. With any normal—anything normal, we would insist that he be put on there, yes, I agree with you on that part.

Q. All right. Now, under this—one other thing. You said that only about half of the men who had been upgraded in 1950 had completed their work requirement. I believe you said that.

A. I said that.

Q. Some of them are dead, aren't they?

A. Some of them are dead.

Q. Yes, sir.

[fol. 74] A. I'm talking—yes, some of them are dead, yes.

(Tr. 109) Q. And some of them have gone, taken other jobs somewhere else?

A. That's true.

. . . . .

(Tr. 112a) Q. You did say, if I understood you correctly, that you had only one occasion when you had had a man set back to a helper, where you had had to go into it with the railroad?

A. Yes, sir, I think that——

Q. What was the outcome of that?

A. The man was upgraded again.

Q. I see. You were successful in persuading the railroad of your point of view?

(Tr. 113) A. Well, there's every case the facts is not developed. We sometimes think they are pretty hard to get along with; other times maybe they got merit to their side. I think they recognized our merit in this case.

. . . . .

(Tr. 114) Q. Yes, but let me ask you this: Did you ever have an occasion when a man who wanted a job as a setup carman, he wanted to move up, and he was a senior man among those who wanted to move up, did you ever have a case when he didn't move up?

A. He was a senior man and wanted——

Q. He was the senior man; you've got a list of helpers here and here's several here at the top who for one reason or another don't want to be set up, then here you have got, say No. 6, who is the oldest man in point of seniority on the common helpers' roster, he wants the job, there is a vacancy as a setup carman and he wants it. Has there been ever an occasion when a person in that position didn't get it?

A. You're asking me the question when a senior employee

(Tr. 115) wants the job does he always get it?

Q. Well, in moving from helper to setup carman, yes,

[fol. 75] that is the question I'm asking, if he puts in a bid on the job and says, "I want it"?

A. You don't put in bids in the first place, and we have had exceptions where the oldest wanted the job wasn't set up.

Q. How many times has that happened?

A. Oh, that is very limited. I just got one in my mind at the present time.

Q. Exactly.

A. I believe I know of two.

Q. As I recall it, Mr. Bond, when I talked to you in your office last Friday with Mr. Rosso, one of my associates along, you told me at that time that you had only one example in mind at that time.

A. I think we was referring to the Ritten case that come in as a matter of record.

Q. Yes.

A. And we have it here in court right now.

* * * * *

Bond—Redirect

By Mr. Yost:

(Tr. 119) Q. Well, now, I understood you to say in answer to their cross-examination that among those men who wanted to be upgraded, where there was an opening, the senior man was always hired except in one case that you know of. In other words, you knew of one case where it wasn't done.

A. Where the senior man——

Q. Senior man was——

A. No, senior man wasn't always upgraded, I only knew of one case, or maybe two, where the senior man that wanted it. We had senior men that turned it down on account of age.

(Tr. 120) Q. In other words, the case where you're talking about is where he wasn't considered qualified enough to be upgraded, is that right?

A. That's right.

Q. That is based on your personal knowledge of the [fol. 76] Sedalia situation, isn't that what you're talking about there?

A. How is that? I don't get that.

Q. Well, you say you only know of one instance. You don't know of all the instances on all the various points on the railroad?

A. No, sir, this is just a point where I happen to be local chairman at Sedalia.

Q. And that was at Sedalia, Missouri?

A. Yes, sir.

Q. So there could be other instances where the senior man was not upgraded because he wasn't considered qualified, isn't that right?

A. Well, another instance happened right here where the case came to this office where we got it changed, yes, sir. He was later upgraded.

(Tr. 121) Q. I mean that promotion then to carman did not depend on how long they had been upgraded, but depended on their actually working out this time?

A. Working out their time.

Q. That is what I am getting at. It wasn't simply a matter of their seniority?

A. No, sir. We had people that refused to be upgraded and later was upgraded and that changed their seniority status from a difference on a helper's list—I mean be different when it got on the mechanics' list.

Donald I. Tilton—Direct

By Mr. Mahlman:

(Tr. 123) Q. Mr. Tilton, you have been employed, according to our stipulation, since July of 1949, by the railroad at Kansas City. I want to ask you if you can tell me on the basis of your own personal knowledge, having been employed there that long, whether you can recall any single instance where the man with the greatest seniority on

the helper's roster, who wanted a vacancy in the setup carman status, didn't get it?

A. I have never known that to happen.

[fol. 77] Q. Now, I want to ask you one other question: When it is necessary for one reason or another for men to be set back from setup carman back to helper status, in what order are men set back?

A. The youngest setup carman.

Q. In the time that you have been employed in Kansas City by this railroad, do you recall any instance when men were set back in any other order?

A. No, sir.

(Tr. 124) Q. One other question, Mr. Tilton: Can you recall of any instance where a man has been set back from setup carman back to helper for any reason other than either there was a reduction in force or he voluntarily relinquished his setup status?

A. No, sir.

Guy H. McClearn, Jr.—Direct

By Mr. Mahlman:

(Tr. 125) Q. Mr. McClearn, it's been stipulated that you have been employed here at St. Louis by this railroad since May of 1950. In the time that you have been employed here, sir, can you recall of any instance where the senior man on the helper roster who wanted a vacancy as a setup man did not get that vacancy?

A. No, sir.

Q. Would you tell us in what order a setup men were set back to helper status in the event of a reduction in force or some reason such as that?

A. Well, the older, the last man laid off or set back to helper (Tr. 126) is the first one recalled to be reinstated back to a helper's setup helper.

[fol. 78] Q. Do you know of any instance where anyone was ever set back for any reason other than either a reduction in force or because the man wanted to relinquish his status?

A. Not to my knowledge.

* * * * * *

Wilford L. Beck—Direct

By Mr. Mahlman:

(Tr. 126) Q. Mr. Beck, according to our stipulation, you have been

(Tr. 127) employed at Alexandria, Louisiana, by the Missouri Pacific since May 1950. I would like to ask you, sir, if you can recall any instance since that time at Alexandria where a senior helper, who wanted a vacancy as a setup man, didn't get a vacancy when it occurred that he wanted?

A. No.

Q. Would you tell us in what order setup helpers were set back in the event of a reduction in force?

A. How?

Q. Yes, in what order.

A. Youngest man cut off first.

Q. Do you know of any instance where any man at Alexandria was ever set back from setup status to helper for any other reason or in any other order?

A. No.

* * * * * *

[fol. 79] Beck—Cross

By Mr. Yost:

(Tr. 128) Q. Mr. Beck, do you know an S. J. Gilliet?

A. Gilliet.

Q. Does he work in Alexandria?

A. Yes.

Q. W. C. Johnson, do you know him?

A. Yes, sir.

Q. Does he work in Alexandria?

A. Yes, sir.

Q. What capacity are they employed?

A. They are helpers, carmen helpers.

Q. How long, if you know, how long have they been carmen helpers? About?

A. Been over fifteen years. They already worked as temporary carmen before and turned it down.

Q. That is just what I wanted to get at, so you have answered the question. They worked their time then?

A. Worked their thousand and forty days and turned it down. Also another man there too.

Mr. Yost: All right, that is all I want. Thank you.

(Witness excused.)

* * * * *

[fol. 80] O. L. Dobbelaere—Direct

By Mr. Mahlman:

(Tr. 129) Q. Would you state your name and address, please?

A. O. L. Dobbelaere, 811 North Montegall, Kansas City, Missouri.

Q. What is your present employment, Mr. Dobbelaere?

A. I work for the Missouri Pacific Railroad as a car inspector in the yard.

Q. You are a carman, is that right?

A. Yes.

Q. When were you first employed by the Missouri Pacific?

A. October 15th of 1948.

Q. As of what date have you been a journeyman carman mechanic?

A. You mean as a permanent carman?

Q. That's right.

A. That was December 11, 1956.

Q. Mr. Dobbelaere, I want to ask you if in the time since you have

(Tr. 139) been employed at Kansas City, since 1948, can you tell of any—do you recall any instance where a helper who was the senior helper, who wanted the vacancy, wanted a vacancy as setup carman and did not get that vacancy?

A. No, not to my knowledge.

Q. Would you tell us in what order men who have been set up to carmen are set back to carmen helper status in the event of a reduction in force?

A. The last man that would be set up would be the first man set back.

Q. Do you recall any instance where anyone was ever set back other than pursuant to that arrangement?

A. No, not to my knowledge.

* * * * * *

[fol. 81]

[Testimony of Defendant's witness G. W. Johnson, Assistant Chief Personnel Officer of Missouri Pacific R. R.]

* * * * * *

Johnson—Direct

By Mr. Yost:

(Tr. 148) Q. I didn't have reference to setting them up from helper to carman. I had reference to giving them a permanent date as a carman after they had been set up for the required period of time.

A. No one would be eligible to exercise the option to become a journeyman mechanic until he has served the required number of days and it would not necessarily be in the order in which they had been set up.

* * * * * *

(Tr. 150) Q. I want to hand you now Plaintiffs' Exhibit H and ask you if that is a letter directed to you from Mr. Bond dated October 1, 1957, referring to that conference to which you just had reference?

A. This letter is addressed to Mr. B. W. Smith, Chief Personnel Officer, attention G. W. Johnson, which confirms, it says, a conference with me on August 7th, 1957, which included some eight items in the discussion.

Q. Does one of those eight items refer to this particular problem?

A. Yes, Item 8, the last item on this letter, refers to the discussion concerning the retroactive date for employees who had returned from military service.

Q. I would like for you to read that to the court if you please.

A. It is Item No. 8.

> "This item concerned the re-employment of employees in military service and requested that they be permitted to be upgraded or if upgraded, permitted to finish their time and be given retroactive date. Mr. Johnson advised that he did not want to afford them that and that the rule

[fol. 82]

> (Tr. 151) did not provide for this. He also stated that he did not care to enter into an agreement, particular reference made to Mr. Kaiser's case, Hoisington, Kansas, and Mr. Tilton's case, Kansas City, Missouri. This subject is to be held in abeyance for the time being as no request was made by System Federation #2 and the matter was first discussed with Mr. Johnson at his request."

That is signed by Mr. W. H. Bond, President, and Mr. R. E. Martin, Secretary-Treasurer, System Federation No. 2.

Q. Mr. Johnson, can you explain why you did not want to enter into an agreement of that sort with the union?

A. When I first became acquainted with this re-employment problem in early '49, at the time Mr. Short was Chief Personnel Officer, these matters were directed to me, and in view of the fact that the Congress had enacted legislation dealing with the rights, or re-employment rights of veterans, we at that time arrived at a policy that we

would not make the re-employment rights of veterans a subject of agreement, but that we would record them such rights as were provided by law. We felt we could do no less and should not be asked to do more. That policy has not been changed, although it has been re-examined by me personally on two occasions.

Johnson—Cross-examination

By Mr. Barnes:

(Tr. 152) May I have Plaintiffs' Exhibit K?

I suppose you are not familiar with the testimony which Mr. Smith

(Tr. 153) gave earlier in this case, Mr. Johnson, but in response to a question as to whether there had ever been an instance when a man had been set up, temporarily advanced to a helper, and who had been set back for lack of qualifications, he was able to come up with the name of only one man, one A. L. Hornbeck. Now, I ask you to [fol. 83] examine Plaintiffs' Exhibit K, which was furnished to us by the defendant, which is the work record of Mr. Hornbeck.

A. All right.

Q. Would you tell me the total number of days that he worked as a setup man before he was set back?

A. It shows here twenty-eight.

Q. Twenty-eight days. Now, as a corrollary to Rule 13(a), which ideals with the right to bid on vacancies, isn't it true that Rule 13(h) gives a man thirty days to qualify in the job?

A. A man that is assigned to a job would have thirty days within which to qualify under that rule.

Q. Mr. Hornbeck did not have thirty days?

A. Well, his number of days worked apparently were not thirty, but his period from the time set up until he was set back exceeded thirty.

Q. I recognize that, but he only worked twenty-eight days?

A. That is what it shows there.

(Tr. 155) Q. Now, you told Mr. Yost that when a man completed his carman seniority, his work requirement for carman seniority, he was set up. I mean he was given that date?

A. If a man is selected for temporary work as a carman, and after he has completed the prescribed time in service as such, then he would have an option.

Q. And that is the employee's option?

A. Yes, it would be his option.

Q. Either to set back to helper or to keep on with taking the bottom of the carmen's seniority roster?

[fol. 84] A. Yes, he would have an option then to elect between accepting the date as a carman, the day he finished his required time or,—and if he did that, he would have to at the same time relinquish all seniority as a helper.

(Tr. 156) Q. Yes, sir.

A. If he didn't choose to do that, of course, he could just remain a helper.

[fol. 85]

Testimony taken by Depositions in Kansas City (hereafter called "KC Tr.")

[Testimony of employee Ford]

* * * * *

(KC Tr. 3) Q. Do you recall when you first set up to temporary carmen?

(KC Tr. 4) A. Temporary carman? 1st, '48.

Q. January '48?

A. January '48.

Q. And then do you know how long you worked before you got your carman seniority date?

A. Well, I was permanent mechanic February '51.

* * * * *

By Mr. Barnes:

(KC Tr. 6) Q. You don't know? During the period, Mr. Ford, that you were employed as a carman helper and later as a setup man and later as a permanent carman, did you ever know of a setup man to be bumped back to helper for lack of ability to perform the work?

(KC Tr. 7) A. No, I never knowed.

Q. Occasionally people were set back for reduction in force?

A. Reduction in force, they were set back, yes.

Q. Occasionally there were people who for one reason or another requested to be set back, is that a fact?

A. I believe so, yes.

* * * * *

[Testimony of employee Ogle]

* * * * *

(KC Tr. 25) Q. During this period from May of 1947 until August of 1953, which is the period during which you were hired, were set up and got your seniority date, do you know what the practice was with reference to how and when you got your permanent seniority?

[fol. 86] A. Just what do you mean? Of carmen, or what?

Q. As carmen. In other words——

A. 1952.

Q. What did you have to do to get that permanent seniority date?

A. Had to work four years and one day.

Q. Right. Have you ever known a setup man, a temporary carman, to be set back to helper for lack of ability?

A. No; not that I know of.

Q. I assume you have known a man that was set back for a reduction in force or for a strike?

A. Only way I know they was set back would be a layoff or somthing like that.

(KC Tr. 26) Q. Right. How are the people who are to be

set up to temporary carman selected, on what basis, if you know?

A. Well, got to have so many days in.

Q. So many days in as what?

A. As the four years and one day.

Q. Well, now, we are talking about two different things. You are talking about permanent carmen; I am talking about the time when you are set up to helper, to temporary carmen.

A. That is what I am talking about. I am talking about setups. You might work—you may get six months in, you may get eight months; they might turn around and have a layoff and you might get set back. I have had to lay around until——

Q. I am talking about how you get to be set up in the first instance. In other words, you went to work in November of '47 and you were set up in November of '48——

A. That is up them. If they are short in men or everything, why, they set them up.

[fol. 87] Q. Does seniority as carman helper have anything to do with their being set up?

A. Sure, they go by seniority, yes. They call the first man and go right on down the road.

Q. If I understand you, they call the oldest helper?

A. That is right.

(KC Tr. 27) Q. Are there times when the oldest helper does not want to be set up?

A. That is right.

Q. But it is his choice?

A. It is his choice; he can turn it down. And I know a lot of them has turned it down three or four times.

Q. Usually do you know why that is?

A. Because they don't want to lose their seniority as an oiler or——

Q. In other words, high seniority as a helper?

A. Whenever you get to carman you drop all your seniority and start at the bottom and go up.

• • • • •

[Testimony of Tony Rodina, Financial Secretary of Carmen Local 36]

(KC Tr. 39) Q. You just go ahead and enlighten me in your own words.

A. What I am trying to say now, the company needed mechanics and they couldn't hire any mechanics, so their next step was to upgrade some helpers.

Q. And would seniority as a helper have anything to do with who was selected for upgrading?

A. Seniority of a helper, yes. We started out with truckmen; they were first on the list to be set up. And then apprentices, regular and helper apprentices, accord- [fol. 88] ing to their seniority. And then the last came the helpers.

Q. Also according to their seniority?

A. According to their seniority.

Q. Now, did you have occasions when a carman helper would refuse a setup?

A. We have.

Q. Is that usual or unusual?

A. It is usual.

(KC Tr. 40) Q. To your own knowledge why would a carman helper refuse a setup?

A. Well, back there in that early period——

Q. Well, now, wait. Let me interrupt you. We are talking now specifically from the period from '47 to '53.

A. Okay. In that period a helper working seven days a week would make more money in thirty days than a carman that at that time would only work six days, see. So that was the reason why some of them turned it down.

Q. Would their position on the helpers' seniority list also be affected, so that might cause them to turn it down.

A. I didn't catch that.

Q. Would their position on the helpers' seniority list also be a reason that they might turn it down?

A. Well, it could be.

Q. In other words, if they were the oldest or the second oldest helper on the list they would be more likely to turn it down than a man who was low down on the helper list?

A. Well, that could be a reason; but I don't know that that was the reason.

Q. Do you know of your own knowledge, Mr. Rodina, of an instance where there was a vacancy for an advanced helper, that is, a vacancy in the carman craft, where the senior man who was willing to take it did not get the job, [fol. 98] the (KC Tr. 41) senior man on the helper list? I had better rephrase that question. Assuming, Mr. Rodina, that there were no truckmen, apprentices or helper apprentices available to fill a setup job, do you know of an instance where the senior helper that wanted the job didn't get it?

A. No.

Q. Do you know of an instance, and I will extend this now to the entire period of your employment with Missouri Pacific, where a man who had once been set up was set back for lack of ability?

A. No.

Q. Do you know of an instance where a setup man who had completed his three years or four years or 1,040 days, whatever it was at the time—do you know of an instance where he wasn't offered his carman seniority after he had completed his work time?

A. Well, the only one instance I can refer to is when we had a reduction in force. I can't tell you the exact date without looking in my record. A man that went out this time about the same time we had the reduction in force, and they didn't find that he had the number of days required to be mechanic and they didn't ask him at the time. But they set him back and found out later that he had the (KC Tr. 42) number of days, that he could have stayed as a mechanic. But he didn't do anything about it himself individually; so nothing was done.

Q. I see. In other words, it was an oversight and he didn't take any steps to correct it?

A. It was an oversight on both sides, with the Committee and also the man himself.

* * * * *

[fol. 90] Testimony of A. F. McMain, Local Chairman of Carmen at Alexandria, La. (deposition taken at Alexandria, hereafter called "Al. Tr.")

(Al. Tr. 3) Q. How long have you been local chairman, Mr. McMain?

A. Well, the last time, since 1952. Along about October of '51 was the last time, but I was local chairman in 1940, up through 1944 or '45. Then I went back in '48 and held it until December of '50, as local chairman.

Q. And then you were again local chairman in the fall of '51?

A. That's right, to the best of my knowledge. Of course there may be little variations.

Q. Mr. McMain, during the time you have been local chairman, and also during the time you have been employed by the Missouri Pacific, can you tell me of an instance when (Al. Tr. 4) a man who has been set up to temporary carman has been set back to carman helper for any reason other than reduction in force, or with his own consent?

A. Well, I don't know of any man that has been set back on account of not being capable of performing his work. I do know of three instances where a man completed his thousand and forty days and of his own choosing chose to go back to his seniority as a helper, turning down the permanent carman job.

Q. Who made that choice or decision, the railroad or the man?

A. The man.

Q. Am I correct in saying that he could have elected to take carman seniority if he had wanted to? In other words, his choice was to take carman seniority or to be set back to helper?

A. He chose the helper seniority in preference to the permanent carman seniority.

[fol. 91] Q. In the usual case, Mr. Yost, if you know, why would a man do that?

Mr. Yost: Are you talking about Mr. McMain?

Mr. Barnes: I mean Mr. McMain, I'm sorry.

A. Well, there's various reasons.

Q. (By Mr. Barnes) Well, would one of them be that he had very high seniority as a helper?

(Al. Tr. 5) A. Some of them enjoy quite a number of years seniority as a helper. Then they would rather hold a daylight job as a helper than to hold a night job as a permanent carman in the train yard union station.

Q. Has there ever been an instance to your knowledge where a man finished his time as a helper, that is, whether it was a thousand and forty days or four years or three years, whatever it was at the time, who was refused carman seniority by the railroad?

A. Not after he had completed his time.

* * * * *

(Al. Tr. 7) Q. Mr. McMain, I am going to ask you to read Rule 13 (h) in that '49 agreement and consider the answer you just made.

A. (Witness reads document)

Yes, it says "not to exceed thirty days."

Q. Then when a man has completed thirty days as a set up man, in actual practice what are his rights, so far as going on and finishing his thousand and forty days? Does he have a right to go ahead and work them out, or can he be set back at any time?

A. Well, that depends on the force that is needed.

Q. I'm talking about excluding reduction in force, assuming that the job is there.

A. He can give a letter stating that he doesn't want the temporary set up job, that he would rather go back to helper. [fol. 92] But when he does that, then he has to wait until all the eligible employees are permitted to exercise their seniority on the temporary basis.

Q. Well, once he has got his thirty days in, does he have any right to keep on as a temporary man, providing there is work available?

A. Yes, he has the right to continue.

(Al. Tr. 9) Q. And I want to ask you, is it reasonable to believe that work would have been available to Clarence Moore when it was not available to Earnest Knox?

A. Well, under the ordinary circumstances, the man with seniority should be working over the union man.

Q. In other words, if there was work available Knox would have had first call on it over Moore?

A. That's right.

(Al. Tr. 15) Q. All right, let's take this situation. Suppose you have a helper who wants to take a carman's job because there's a vacancy available, and he comes to you and he says, "I'd like to take that carman's job," and you and the local committee decide he can't read or write, he can't learn the rules, but he is a senior helper. Does he get that job?

A. No, if he can't read and write the English language.

Q. In other words, if he is not qualified to take that job he doesn't get it, does he?

A. No.

Q. All right. Then it's not a matter of seniority, is it?

A. It's not a matter of seniority.

Q. Okay, that's what I want to know.

A. It's a regular routine. You drop on back down to the man that is available.

[fol. 93] Q. And that's qualified?

A. That's right.

Q. So that you don't——

A. You have to qualify him within thirty days.

(Al. Tr. 16) Q. You can't put a helper on a carman's job just on the basis of seniority, he has got to be qualified to be upgraded, isn't that right?

A. There's not but one instance where we have ever failed to qualify a man on account of not being able to read and write the English language or have a fair knowledge of the A.A.R. rules, and that was Charles Ballard.

Q. All right.

A. All the other men have been set up and have made good on the job.

Q. But the fact that there was one instance where a man was deemed not qualified means that he doesn't get the promotion solely on the basis of seniority, isn't that correct?

A. Well, he doesn't—it was not the basis of seniority, it was the basis of his qualifications, not being able to read and write the English language. That's what disqualified him. It tells you——

Q. Who disqualified him on that basis?

A. The committee and the general car foreman.

* * * * * *

(Al. Tr. 27) Q. Now, with reference to Mr. Ballard, you say he couldn't read or write and couldn't get the A.A.R. (Al. Tr. 28) rules. In your experience with the Mo. Pac., is that the only instance where a senior helper who wanted the job was not set up when there was a carman vacancy?

A. That's the only one we have encountered.

Q. And you have been with the Mo. Pac. since 1925?

A. That's right.

[fol. 94] Q. Then if I understand your testimony correctly, there never has been an instance where a man once set up and who wanted carman seniority has not been given it after the completion of his four years.

A. No.

Q. Now, you have named three names who had completed work time, or their four year period or three year period

as it may be, and turned down carman seniority. They were Barnet, Guillott, or Gillot—those old Frenchmen would turn over in their graves.

A. We'll just call it Guillott.

Q. Guillott.

A. That's the pronunciation.

Q. And Johnson. Do you know offhand the position of those three men on the carman helper roster?

A. Well, sir, Barnett is the oldest man on the carman helper roster.

Q. Do you know who the next oldest is?

A. W. C. Johnson.

Q. Do you know who the third oldest is?

(Al. Tr. 29) A. No. I believe Ballard comes in there. I don't know whether he comes in ahead of Johnson or whether he comes in right under him.

Q. Well, I have here—again it's in the record, but I don't have its identification, but it's the seniority roster of carmen helpers as of January 1, 1957.

A. Well, that would be it.

Q. I hand you that to refresh your recollection and ask you where Guillott is on the list.

A. They are all three at the head of the list.

Q. Guillott is in third place?

A. No—yes, Guillott is in third place. Barnett, Johnson and Guillott.

[fol. 95] Q. In that order. And also it's in the record that Guillott finished his thousand and forty days on June the 10th, 1957, and that was the '57 roster I showed you, so that it is a fact that as of January 1, 1957 they were the top three men on the list, on the helpers' list?

A. They still are.

Q. And still are. What does that mean as a matter of practice, Mr. McMain, does it have any effect on how many days a month a man can get work, the position he is on the roster?

A. Well, it means this, a man that has seniority is the man that's working.

Q. And he is the last man to be laid off?

(Al. Tr. 30) A. Yes. In other words, if you are going to cut off all the helpers but three, those three top men would be the ones that would still work.

Q. And had they taken carman seniority, for example if Guillott had taken carman seniority in June of '57 he would have been the bottom man on the roster?

A. The youngest man on the carman seniority roster.

Q. All right. Now, I am not sure what your testimony was on those questions that Mr. Yost asked you about the applicability of rule 116 to permanent helpers. Do they or do they not have a right under 116 to bid to be set up as carmen—to be set up as temporary carmen when there is a vacancy for a temporary carman? Under Rule 116 do they or do they not have the right to be set up to bid on it?

A. Well, it doesn't spell it out here in this agreement, but that's the theory we worked on. That's in order to give the oldest men that preferred to be set up; he has that right to bid. But as long as there's men older than him on the helper roster—a man can be two years on that helper [fol. 96] roster and he can bid, but that isn't considered. But it doesn't spell out in Rule 116.

Q. Umnhmn. In other words, if he bids and an older man bids then——

A. The older man get it.

Q. He's out of luck?

Memorandum Opinion

(Filed in U.S. District Court, March 6, 1961)

These actions are brought pursuant to Section 9 of the Universal Military Training and Service Act (50 U.S.C. App., Sec. 459), and jurisdiction is established under subsection (d) of the Act.

The Act provides that a person who has left a position (other than temporary) in order to perform military service, and who receives a certificate of honorable discharge, makes application with his former employer within ninety days, and is still qualified for the position, shall be restored by such employer to the position or one of like seniority, status or pay. Section (c)(1) provides that in regard to seniority and other benefits, the returning employee shall be considered as having been on furlough or leave of absence. Subsection (c)(2) declares the sense of Congress to be that a person coming under the Act:

> "should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

The U. S. Attorney, upon application of the plaintiffs, appeared for the plaintiffs as their attorney, pursuant to subsection (d). Each of the plaintiffs seeks a seniority date as a carman mechanic which he would probably have received had his work as a set-up carman not been interrupted by military service. The cases were consolidated for trial, only differing in the location of employment and respective dates of the plaintiff's advancement to temporary carman, entry and discharge from military service. Each of the plaintiffs was originally employed and classified as a helper by the defendant, and each was upgraded to the position of temporary carman pursuant to collective bargaining agreements which created the temporary carman position during periods of shortage of skilled mechanics, originally to overcome shortages caused by war.

The agreement in effect at the time of the setting-up of plaintiffs, Tilton and McClearn, April 10, 1950, and August 23, 1951, respectively, and at the date of their induction into military service, October 12, 1950, and October 23, 1951, was a basic agreement, dated May, 1947. Under Rule 116 of the agreement one, without other special training, in order to qualify for carman classification and seniority, was required to have four years' work experience as a carman. No provision was made under the agreement for advancement of helpers, but the agreement was modified by an understanding between the parties that during a period of acute shortage of mechanics, helpers could be temporarily advanced upon approval of both labor and management, but that those advanced would have to meet the qualification requirement of the basic agreement before acquiring a carman seniority date.

In December, 1953, a collateral agreement was entered into providing for the upgrading of helpers "employed at the point where carmen are needed, who are qualified for advancement." The master mechanic or superintendent of shops and local committees were to jointly agree on the helpers to be advanced and selections were to be made first from helpers with two years or more of service. The 1953 agreement provided that an advanced helper would retain his helper seniority until completion of 1,040 days of service as carman, at which time he must make an election in writing either to go back to work as a helper or to take a carman seniority date and lose his helper seniority.

Plaintiff Beck was first set up October 12, 1951, but did not enter military service until March 1, 1955. Plaintiffs Tilton and McClearn, under their theory, could not, even had they been continuously employed, have met the 1,040 days' work requirement before the effective date of the 1953 agreement. The parties, thus, despite the devotion of many pages of their briefs to prior agreements, all agree that the 1953 agreement is controlling.

Each plaintiff upon completion of his military service returned and was restored to his set-up helper position with the same seniority and relative standing on the helper

roster as when he left. Each completed the work requirement of 1,040 days, at which time they elected in writing to take a carman seniority date, the dates being August 28, 1956, December 25, 1957, and December 5, 1957, for Tilton, McClearn and Beck, respectively.

Subsequently, the plaintiffs discussed the matter of seniority with the Bureau of Veterans Re-employment Rights, and this action was brought seeking to have their compliance of work requirements after return from military service effect a retroactive seniority date as carman such as they would probably have received had they not been called to military duty.

Plaintiffs find support for their claims primarily in the case of *Spearman* v. *Thompson*, 167 F. 2d 626, and in the case of *Diehl* v. *Lehigh Valley R. R. Co.* (per curiam 1955), 348 U.S. 960, reversing 211 F. 2d 95. The *Spearman* case involved persons in a similar position to the plaintiffs in this case. The record in that case differed from the instant case in that after the reinstatement of the plaintiffs as set-up carmen they were demoted to helper positions due to a reduction in force, while those helpers who had been advanced to carmen and accumulated three years of service as such without interruption of military duty were retained as carmen. It was stipulated that the appellants in the *Spearman* case were as fully qualified to perform the duties as set-up carmen upon their reinstatement as at the time of induction. It was further stipulated that it was the practice to require three years of actual service before the temporary position became permanent. The question, as the court in the *Spearman* case worded it, was whether appellants were entitled to have the time they spent with the armed forces applied toward seniority in the mechanic classification or merely as helpers. The court answered the question, l.c. 630:

> "If proficiency were the test, no Act of Congress could supply it and these three appellants would have been helpers when they were inducted and would be 'helpers' when they were reinstated."

The court found on the record that the test was not proficiency but a lapse of three years, and that the purpose of the three-year work requirement was merely to protect the seniority rights of others already classified as mechanics, who might then be on furlough.

In *Diehl, supra,* the plaintiff was set up to a temporary carman mechanic prior to his induction in the armed forces. After his induction the union and railroad entered into an agreement which provided that the seniority status of helpers promoted to temporary carmen would be determined after the end of the war emergency. After Diehl's discharge, reinstatement, and after working as a temporary carman more than 1,160 days, it was agreed that such helpers, upon completion of 1,160 days of experience as carmen, should elect within fifteen days whether to remain on the helper roster or be placed on the permanent carmen's roster. The plaintiff's position was that the veterans who were reinstated after service and met the 1,160 days' work requirement should be treated as if continuously employed and under 9(c)(2) given seniority ahead of those originally behind them on the temporary carmen roster whose work-day qualification was met at an earlier date because not interrupted by military duty. The defendant's position was that the veterans should be and were treated as on furlough or leave of absence under 9(c)(2).

The court found the provisions of 9(c)(1) and 9(c)(2) irreconcilable and concluded that the escalator position (*Oakley* v. *Louisville & N.R.Co.,* 338 U.S. 278; *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S. 275; *Aeronautical Industrial Dist. Lodge 727* v. *Campbell,* 159 F. 2d 252) to which veterans were entitled was that which was created by the collective bargaining agreement, and only those provisions which discriminated against veterans were invalid. Since the 1,160 days' work requirement treated Diehl precisely as other workmen, to place him ahead of workmen who first completed the work requirement would create a super-seniority for veterans. In its per curiam opinion the United States Supreme Court, citing *Oakley* v. *Louisville, etc., supra,* reversed upon the facts disclosed in the Third Circuit opinion.

Subsequent to the *Diehl* decision the Supreme Court was called upon to interpret Section 9(c) in *McKinney* v. *Missouri K.T.R.R. Co.*, 357 U.S. 265. The factual situation differed from *Spearman* and *Diehl*, in that it involved a reinstated veteran whose pre-service position was abolished, seeking to displace another employee, not with the company at the time of plaintiff's induction, who had been assigned to a position bulletined during plaintiff's military duty. The collective bargaining agreement gave persons of plaintiffs' group a preference over non-employees in the assignment to positions such as the one in question "based upon fitness and ability." The court found that the advancement sought was one within managerial choice and interpreted Section 9(c) in the following language, l. c. 271:

> "However, Sec. 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance, to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the armed forces but continued in his civilian employment."

The court gave petitioner leave to amend his complaint to show that in actual practice under the collective bargaining agreement the promotion would have been automatic.

Bassett v. *Texas & Pacific R. Co.*, 258 F. 2d 819, involved an apprentice carman's claim for seniority as a carman on a retroactive date selected as the time he would have served

his apprenticeship had it not been for service in the army. The court, citing *McKinney*, found that factors other than time served determined advancement and stated that only where the promotion is automatic can the veteran claim his right. Likewise, in *Poore* v. *L. & N.*, 235 F. 2d 687, on slightly different facts than are involved in the instant case, the court pointed out that where actual experience is an expressed requirement to advancement requiring technical and skilled employment, the Act does not mean to give effect to the mere passage of time.

A most relevant case in *Sularz* v. *Minn., St. P. & S. Ste. Marie R. R. Co.*, 259 F. 2d 122. In that case the veterans had been given, by virtue of an agreement between the defendant and the union, a retroactive seniority date as carmen and placed just above the person who had occupied the next lowest position on the helper roster, which is substantially the position plaintiff seeks in this case. The plaintiff Sularz was seeking to displace two persons, Brinda and Brown, who had not been on the helper roster at the point where plaintiff was employed at the time of his induction, but who had been transferred and assigned to his shop as temporary carman after plaintiff departed for service. Brown and Brinda completed the four-year work requirement before Sularz and were assigned seniority dates ahead of him.

Plaintiffs attempt to distinguish the facts of the Sularz case by pointing out that in that case the plaintiff was given the status sought by the plaintiffs in this action, and that the persons whom Sularz sought to displace were senior to him as helpers. Plaintiffs further point out that at the time Sularz was inducted he had not been upgraded and had no assurance of being upgraded. In regard to the latter suggested distinction, the court, both trial and appellate, determined the fact that Sularz would have been upgraded to temporary carman was not in doubt except as to time. The order of the advancement was dependent not only on seniority but also upon factors of experience and capability. Affirming the trial court, the Eighth Circuit, citing *McKinney*, supra, concluded that the veteran could

not claim status ahead of Brown and Brinda where his advancement to set-up carman was not automatic as to time. A distinction based upon the facts that in one case the promotion sought is from helper to upgraded helper and in this one from set-up helper to permanent carman, where the issue in both cases seeks a determination of whether the promotion was such as would be automatic under contract or practice or something less than automatic, is without merit.

It should be pointed out further that the issue as to whether service time could be applied to effect a retroactive seniority date upon completion of the work experienced as a set-up carman was abandoned in argument to the Court of Appeals, though determined by the trial court against Sularz upon finding that the work requirement fulfilled the function of insisting on skill and proficiency, creating a qualification distinct from a mere lapse of time. The fact that Sularz was, by agreement, given the position sought by plaintiffs in this action does not distinguish the issue presented to that trial court regarding the applicability of time in the armed forces to effect a seniority date as carman where skill, proficiency and experience are required.

The difference in the holdings is in the records presented. The record in the *Spearman* case was found to show that the work requirement was merely a delay in seniority to protect seniority of already qualified carmen. The *Diehl* per curiam decision is stated to be based upon the facts found by the trial court and relies on the *Oakley*, supra case. In *Oakley* the question before the court arose on a motion to dismiss on the ground that the plaintiff's action seeking a retroactive seniority date was brought more than one year after his reinstatement. The defendant claimed the veteran's statutory protection ceased after reinstatement for one year. The court held:

> "Expiration of one year did not terminate the veterans right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment; nor

did it open the door to discriminations against him, as a veteran."

The facts cited by the trial court in *Diehl* established that the first agreement regarding seniority status of the reinstated temporary mechanics was entered into several years after the facts of set-up, service, reinstatement and after Diehl had served 1,160 days in the position of temporary carman. The trial court found the agreement was not discriminatory since it treated all workmen alike. There was no finding as to whether the right to promotion was automatic before or after the agreement or what purpose the work requirement served. The effect of the reversal of the *Diehl* case, in view of the *Oakley* and *McKinney* cases, was to conclude that the agreement after the fact which made a distinction in treatment in essence depending upon continuous service, was discriminatory to the veterans.

The question before this court is whether the promotion to permanent carman was so automatic, under the bargaining agreement or actual practice under the agreements, as to entitle a veteran to the statutory protection of promotion advantages lost because of service interruption.

The record clearly indicates that under the agreement the promotion depended on more than a mere lapse of time. The system of classification into helpers and carmen required different qualifications for these distinct positions, the job description being at variance. The position of carman is one of much greater responsibility and skill. Previous to the agreements providing for the upgrading of helpers and other classifications the carmen employed met the qualifications before employment with defendant or gained the qualifications through an apprenticeship program. The provision for upgrading became necessary during the war periods in order to overcome the desperate shortage of trained mechanics. Seniority was not the only consideration under the agreement in determining which helpers would be set up, although in actual practice it carried greater weight than the agreement would require.

Most often where the senior man was not set up it was by virtue of amicable agreement that under the circumstances the advantages for the particular employee were in retaining the helper position.

After being set up a man was not considered a qualified carman, but only qualified by capacity to learn a carman's work. Plaintiff McClearn, in explaining why he accepted the set-up position, pointed out the purpose of the work requirement, saying: "Well, as a helper you are restricted in some work, where as a carman you gain knowledge of the job which you would like to get promoted to." The work requirement, unlike the record shown in the *Spearman* case, was not merely to protect the seniority of already qualified carmen, but was the agreed test of proficiency.

Promotion to permanent carmen was not only dependent upon a completion of the work requirement, but upon the continuing unavailability of qualified carmen, continued satisfactory work in the position, and election upon completion of the work requirement to take the advanced position and give up helper seniority. Only two cases were shown where the set-up man was downgraded—one for failure to qualify and do satisfactory work, and the other was again upgraded after negotiation with union representatives. There were many instances where selection by the employee was one to retain his helper seniority. Furthermore, the time of promotion was uncertain, depending upon lay-off due to illness, reductions in force, and again, the availability of already qualified carmen.

Plaintiffs point out as proof that the set-up carmen were qualified to do carmen's work to the fact that in actual practice they were not all given the wide training of an apprentice, but in fact some served in one capacity, such as car inspector, for most of the work period. This, however, points up the shortage of mechanics and the fact that the set-up carmen were not assigned to the usual wide range of duties because of lack of qualification, as seriously as it suggests proper qualification under customary practice.

Under the contract there was no automatic right to promotion. Viewing the circumstances in retrospect, in actual practices there was a high probability of advancement at some earlier date except for the interruption of military service, but high probability will not suffice. *McKinney* v. *Mo. K. T. R. R. Co.*, supra.

As has been stated, the work requirement was intended to be a period of on-the-job training to increase proficiency and skill through actual experience. More is involved than seniority status. The Act, assuring to veterans no loss of seniority, or promotional advantage, does not insure advancements dependent on factors other than mere lapse of time. Experience as required by the employment agreement cannot be provided by the statute, nor is it the statute's purpose to upset the settled status of employees who derive their standing in accordance with the seniority system agreed to.

The court will accordingly find for the defendant.

ROY W. HARPER,
U. S. District Judge.

Dated: March 6, 1961

PLAINTIFF'S MOTION FOR ADDITIONAL FINDINGS OF FACT

(Filed in U. S. District Court, April 12, 1961)

Plaintiffs herein respectfully move the Court to make the following additional findings of fact in these consolidated cases:

1. The record discloses no incident where, when a vacancy for upgraded helper occurred, such vacancy was not filled by the helper with greatest seniority who wanted the upgraded position.

2. Since the adoption of the original agreement in 1942, only two helpers who had been upgraded were set back to helper, before completing the requisite work requirement to acquire mechanic's seniority, for being unable to per-

form the duties of upgraded carman. One of these was subsequently reinstated as a set up helper after union intervention on his behalf.

3. During the period plaintiffs worked as helpers upgraded or "set up" to carmen, and during their absence in military service, qualified carmen continued to be unavailable to fill carmen's positions with defendant, and defendant obtained carmen for these positions by promoting to permanent carmen those helpers who had been upgraded, in the order they completed the work requirement and elected to be promoted.

4. Carmen's work was assigned to the upgraded helpers in order of date of upgrading, with the helper most recently upgraded being laid off or set back if carman's work was unavailable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed in U. S. District Court, May 3, 1961)

These consolidated cases came on for trial, and the Court, having considered the pleadings, the evidence, and the stipulation of the parties, and being fully advised in the premises, now finds the facts and states its conclusions of law.

Findings of Fact

The Court adopts the stipulation of facts filed herein by the parties and finds the facts stated therein to be true, and the memorandum opinion filed by the Court. In addition, the Court finds as follows:

1. The defendant is a corporation, maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court.

2. Prior to entering upon military service, each of the three plaintiffs was employed by the defendant in positions other than temporary, and left such positions in order to

perform military service. Upon completion of their military service, each of the plaintiffs received a certificate of honorable discharge and applied to the defendant for re-employment within 90 days after such discharge.

3. At the time plaintiffs left the defendant's employ to perform military service, each was classed as a carman helper and held seniority only as a carman helper, but each had been "set up" or temporarily advanced to the position of carman pursuant to certain collective bargaining agreements which permitted such temporary utilization of carman helpers as carman because of the shortage of qualified carmen. In their upgraded positions as carmen, the plaintiffs continued to hold seniority only as carman helpers and acquired no seniority or other rights as carmen.

4. Upon the completion of their military service and their application to defendant for re-employment, each of the plaintiffs was restored to his previous position as carman helper, with the same seniority date and the same relative standing on the helper's seniority roster as he had on entering military service. Each was also temporarily advanced to the position of carmen because of the continuing shortage of qualified carmen at the time they were re-employed by defendant.

5. Effective July 1, 1942, defendant entered into an agreement with the union representing carmen and carman helpers which permitted the temporary advancement of apprentices and of helpers to service as carmen as long as qualified carmen were not available to fill carmen's positions. This agreement also provided that helpers so advanced who accumulated three years of service in carmen's positions may acquire a carmen's seniority at the end of their three years of such service.

6. In May of 1947, the defendant and the carmen's union entered into an understanding which abrogated, as to any helpers threafter selected for advancement, the provision of the 1942 agreement which gave to the helpers who had accumulated three years of service as temporary carmen any right to acquire a carman's seniority. Any helpers selected for advancement after May, 1947, could qualify as carmen

and acquire a carman's seniority only as provided in Rule 116 of the Basic Collective Bargaining Agreement, which required a minimum of four years' experience in carmen's positions. By the time that any of the plaintiffs had been upgraded, the four-year requirement was strictly enforced at the points where they were working, and plaintiffs all understood when they were upgraded that four years of actual work in carmen's positions were required in order to qualify as carmen.

7. On December 7, 1953, a collateral agreement was entered into between the defendant and the carmen's union which completely superseded the 1942 agreement, and which established new criteria as to how an upgraded helper could acquire seniority as a carman. In substance, this agreement provided that an upgraded helper would retain his helper's seniority until he had completed a total of 1,040 days' actual work in a carman's position, at which time he was required to make an election in writing either to relinquish his seniority as a helper and take seniority as a carman as of that date, or retain his helper's seniority and go back to working as a helper.

8. Pursuant to the 1953 agreement, the defendant kept an actual record on each upgraded helper of the days worked in a carman's position, counting the days worked prior to the date of the agreement, as well as those worked after the agreement. When an employee had completed 1,040 days in a carman's position, the defendant notified him of that fact so that the employee could then make his election between a helper's seniority and wages or a carman's seniority and wages. If the employee chose a carman's seniority, he was placed at the bottom of the carman's seniority roster.

9. Under the 1953 agreement, as well as the 1942 agreement, the selection of helpers for temporary advancement to positions as carman was made jointly by the shop superintendent or master mechanic acting for the defendant and by the Local Committee acting for the union. The contract further provided that *selections* for advancement were to be made with due regard to seniority and qualifica-

tions for advancement. By "qualifications" the parties meant aptitude for learning the trade and skills of a carman; they did not mean to imply that a helper selected for temporary advancement was to be considered as a qualified carman when selected. As a matter of actual practice, the selection of helpers for upgrading was not always in strict order of seniority.

10. The 1,040 days' work requirement established by the agreement of December 7, 1953, and the four-year work requirement in Rule 116 of the Basic Agreements were intended by the parties thereto as a period of the on-the-job training for the purpose of increasing proficiency and skill through actual experience. The actual practice under these contracts, at least from the time any of these plaintiffs were first upgraded, was in accord with that intention, and upgraded helpers, including plaintiffs, were required to complete four years (prior to December 7, 1953) or 1,040 days (after December 7, 1953) of actual work in a carman's position before they were considered sufficiently skilled to qualify as carmen and acquire a carman's seniority.

11. Plantiffs Tilton and McClearn left for military service prior to December 7, 1953, agreement. At that time, neither one had met the four-year work requirement for promotion to carman, nor could they have met that requirement prior to December, 1953, even if they had been continuously employed. After their return from military service and after the December, 1953, agreement, they were given credit for all days they had worked in carman's positions before the date of that agreement.

12. Before leaving their positions for military service, Plaintiff Tilton had worked a total of 145 days, McClearn had worked a total of 21 days, and Beck had worked a total of 851 days as temporary carman. After their return and re-employment by the defendant, each plaintiff completed the 1,040 days' work requirement established by the 1953 agreement, counting the days worked before military service, as well as days worked after return from military service. Upon completion of the work requirement, each plaintiff elected in writing to relinquish his helper's seniority

and to take a carman's seniority. Thereupon the defendant accorded each plaintiff a seniority date as carman as of the date following completion of the 1,040 day work requirement.

12. The position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper. Prior to the shortages of qualified carman growing out of the war, a person became a qualified carman through four years of apprenticeship training in all phases of a carman's work. Except insofar as the upgrading agreements of 1942 and 1953 permitted carman helpers to be used for carmen's work, when qualified carmen were not available, carman helpers were restricted to the work described in Rule 118 of the Basic Agreements, Separate seniority lists were maintained and carmen helpers had no right to bid on vacancies in the man's classification.

13. Whether or not the plaintiffs or any of them, if they had not been in military service, would have worked as a temporary carman on every date that such work was available during that period, and whether they would have completed the 1,040 day work requirement before the next upgraded helper or by any given date is not certain, even though in retrospect it may be regarded as highly probable. Nor is it certain that upon completion of the work requirement at an earlier date each of the plaintiffs would have elected to relinquish their helper's seniority.

14. The plaintiffs and other carman helpers who were temporarily advanced to carman's positions under the 1953 or prior agreements had no guarantee, either by reason of the contracts or actual practices under the contracts, that they could ever complete the 1,040 day work requirement in order to qualify as a carman or acquire a carman's seniority. The completion of the work requirement and the date of completion depended on a number of variable factors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position.

Conclusions Of Law

1. This Court has jurisdiction of these cases under the provisions of Section 9 (d) of the Universal Military Training and Service Act (50 U.S.C. App. Sec. 459).

2. The seniority rights of the plaintiffs are subject to non-discriminatory terms and conditions of collective bargaining agreements entered into between employer and employee representatives as provided in the Railway Labor Act. It is not the purpose of the Universal Military Training and Service Act to upset or supersede such terms and conditions or the seniority rights of employees which are determined by the seniority system thus agreed to.

3. In cases where returning veterans claim a right to an earlier seniority date in a different position on the ground that had they been continuously employed they would have been entitled to such earlier seniority date, the burden is upon them to show that under the terms and conditions of the agreements and practices thereunder, they would have acquired such earlier seniority date automatically upon the mere lapse of time or solely by reason of their seniority in the position held when they left for military service.

4. Under the terms and conditions of the agreements by which plaintiffs were permitted to work as temporarily advanced carman, there was no such right of automatic progression to permanent positions as carman.

5. The plaintiffs had not acquired any contractual rights to positions or to seniority as carman before they entered military service nor before the effective date of the December, 1953, agreement. Whatever rights they have to acquire seniority as carman is governed by the terms and conditions of that agreement.

6. Under the December, 1953, agreement, the plaintiffs could acquire no seniority rights as carman until (1) they had accumulated 1,040 days of actual work experience in carmen's positions, and (2) they elected in writing to relinquish their helper's seniority and to take a carman's seniority at the time they completed the 1,040 days' work requirement. The period of time when plaintiffs were on

leave of absence, in military service, or not working as carmen for any other reason, could not be counted as equivalent to the actual work experience in carmen's positions required by this agreement.

7. Even though it appears, in retrospect, that plaintiffs probably could have qualified for and would have elected to take a carman's seniority at an earlier date if they had been continuously employed, there is no certainty that they could have or would have done so at any give time, or that they would have acquired such seniority before any helper upgraded after they were. A showing of high probability of promotion to a better position does not meet the plaintiffs' burden of proving that such promotion was a matter of automatic progression.

8. Plaintiffs have not shown any violation by the defendant of their re-employment rights under Section 9 of the Universal Military Training and Service Act, and are, therefore, not entitled to any relief sought in these actions. These actions will, therefore, be dismissed upon the merits and judgment entered in favor of defendant.

ROY W. HARPER,
United States District Judge.

Dated: May 3, 1961

JUDGMENT

(Filed in U.S. District Court on May 3, 1961)

The above-entitled actions, consolidated for trial, having been tried before the Court, and the Court having filed its memorandum opinion and having entered its findings of fact and conclusions of law, finding and adjudging the issues generally in favor of the defendant, it is therefore

ORDERED, ADJUDGED, AND DECREED, that the plaintiffs shall not have any relief in these actions, and each action shall be, and is hereby, dismissed on the merits.

Dated May 3, 1961.

ROY W. HARPER,
United States District Judge.

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105 In the United States Court of Appeals for the Eighth Circuit

No. 16814

DONALD I. TILTON, APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

No. 16815

WILFRED L. BECK, JR., APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

No. 16816

GUY H. MCCLEARN, JR., APELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

Appeals from the United States District Court for the Eastern District of Missouri

Opinion August 17, 1962

Before VOGEL, BLACKMUN and RIDGE, Circuit Judges.

BLACKMUN, Circuit Judge.

These are separate actions instituted under § 9 of the Universal Military Training and Service Act, as amended,
106 50 U.S.C. App. § 459.[1] The three plaintiffs, employees of Missouri Pacific Railroad Company, were each promptly reinstated in railroad employment following satis-

[1] This Act, adopted in 1948, succeeded the Selective Training and Service Act of 1940, 54 Stat. 885.

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factory completion of a period of military service. By these suits, however, the plaintiffs, represented by government counsel as authorized by § 9(d) of the Act, now seek to compel the railroad to grant them the higher seniority which they allegedly would have attained had military service not interrupted their civilian employment.

The actions were consolidated for trial. The district court held that the plaintiffs were not entitled to the relief they sought. It entered judgment for the defendant in each case.

The facts of the three cases are parallel. For the most part they are stipulated and, in any event, the trial court's findings of fact are not challenged here.

World War II occasioned a shortage of qualified carmen. In an attempt to cope with this situation the railroad and the bargaining representative, Brotherhood Railroad Carmen of America, entered into a series of agreements.[2] The pertinent provisions of the applicable contract are set forth in the
107 margin.[3] In general summary, it (a) provides for the advancement, under certain conditions, of carmen helpers to temporary carman status; (b) specifies that selection of helpers so to be advanced shall be made as the master mechanic or shop superintendent and the union's local committee

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[2] The agreement important here is one effective August 1, 1953, and is collateral to the basic agreement between the railroad and the union. It is a successor to other agreements and in turn has since been supplemented. The parties concede its applicability.

[3] "Section 1.

"When the Carrier is unable to employ qualified carmen, truckmen, apprentices and helpers will be advanced to carmen as prescribed by this agreement.

"Advancements will be made in the following order and manner:

* * * * *

"(d) Should the need for carmen not be met by the advancement of truckmen and apprentices, helpers employed at the point where carmen are needed, who are qualified for advancement, will be so advanced. First choice to be made from helpers with two years or more of service as such. Master Mechanic or Superintendent of Shops and Local Committee will jointly agree on the helpers to be advanced. In the event there is disagreement on one or more helpers, * * * the names of the helpers not agreed on * * * will be referred to the General Chairman and Chief Mechanical Officer for prompt determination of the qualifications of the men involved. * * *

"Section 2.

"A list of all men advanced temporarily as carmen will be compiled and maintained. Men will be listed on the same in the order of their upgrading and the date of upgrading will be shown * * * The listing of the dates is

agree; (c) calls for a chronological listing of men so upgraded;
(d) denies that this dated listing connotes seniority;
108 (e) specifies that any reduction in the force shall be in reverse chronological order; (f) provides for a helper's retention of his helper's seniority during the period of his temporary upgrading; (g) recognizes carman qualification upon a helper's completion of 1040 days of carman service; (h) requires the employee then to select either a carman's status and seniority date as of that time (coupled with a relinquishment of his helper's seniority) or a return to a helper's status; and (i) preserves any temporary upgraded status of a helper who has entered military service.

The pertinent portions of § 9 of the Act are also reproduced in the margin.[4] They provide that one who has left his work with a private employer to enter military service and who

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not to be considered as a seniority date. When force reductions are made, the demotion from carman shall be in the reverse order of upgrading * * *

"Section 3. * * *

"(b) A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper.

"Section 4. * * *

"* * * helpers returning from the armed services, whose seniority has been protected as provided for by the laws of the United States and by agreement between the Organization and the Carrier will be governed by by the following:

"(c) Helpers upgraded to carmen will retain their position on the list of upgraded men if they enter the armed services.

"Section 5.

"Upgraded men will be permitted to make application for vacancies to positions as carmen and if there are no bids received from men who hold seniority as carmen, the upgraded men making application will be assigned based on their position on the upgraded list.

* * * * * * *"

[4] "(b) In the case of any such person who, in order to perform such training by such employer or his successor in interest to such position or to a position) in the employ of any employer and who * * * makes application for

makes timely application for reinstatement after the completion of his service shall, if still qualified, be restored
109 "to such position or to a position of like seniority, status and pay", shall be considered as having been on leave of absence during the service period, "shall be so restored without loss of seniority", and shall not be discharged from his position without cause for a year, and that it was the intent of Congress that he should be so restored "as to give him such status * * * as he would have enjoyed if he had continued in such employment continuously".

Each of the three plaintiffs here (a) was originally employed by the railroad as a carman helper, a non-temporary position; (b) was subsequently, pursuant to the bargaining agreement, upgraded to temporary carman while retaining his helper's seniority; (c) completed, before leaving for military service, only part of the 1040 day work period necessary for permanent advancement to carman; (d) returned from service to his employment as temporary carman; (e) was given the same rela-

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reemployment within ninety days after he is relieved from such training and service * * *

"(B) if such position was in the employ of a private employer, such person shall—

"(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; * * *

"(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

"(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. * * *"

"The 1940 Act contained provisions similar to those of § 9 (b) and (c) (1) but in the earlier Act those provisions were in § 8 (b) and (c). § 9(c)(2) is new in the present Act.)

tive position on the helpers' seniority roster which he had held before the interruption of his employment;[8] (f) then completed his 1040 days of work as temporary carman; (g) then elected to be a carman and to take carman's seniority; (h) received a carman's seniority date as of that time; and (i) thereupon relinquished his helper's seniority.

The specific progress dates for each plaintiff are:

110	Plaintiff Tilton	Plaintiff Beck	Plaintiff McClearn
1. Original employment as carman helper	7-13-49	5-12-50	5-24-50
2. Upgrading to temporary carman	4-10-50	10-12-51	8-23-51
3. Departure for military service	10-12-50	3- 1-55	10-23-51
4. Released from military service	12-23-51	3- 57	6- 53
5. Reemployment after service	1- 2-52	3-11-57	6-11-53
6. Completion of 1040 day work requirement and election to take carman seniority	8-27-56	12- 5-57	12-24-57
7. Seniority date on carmen's roster	8-28-56	12- 5-57	12-25-57

Twenty-nine non-veteran helpers in Tilton's case, six in Beck's, and five in McClearn's, began work as upgraded carmen after the particular plaintiff had been so upgraded. They continued to work in that capacity while the plaintiff was in military service. These men were able to complete the 1040 day work period and to elect carman seniority before the plaintiff did so. They accomplished this, however, after the plaintiff would have reached that goal had it not been for his absence in service, had he worked whenever carman work was at hand, and had carman status been selected by him in preference to the retention of helper's status with its more advanced seniority. These non-veterans are now ahead of the plaintiffs on the carmen's seniority roster. They enjoy over the plaintiffs those advantages, such as work preference, order of layoff, and order of recall, which that seniority dictates.

The plaintiffs complain that their seniority was adversely affected by their absence in military service in that these non-veteran employees, junior on the temporarily upgraded list, are now ahead of them on the permanent list. They claim
111 seniority status ahead of these non-veteran employees. They concede the existence of uncertainties, at the time of induction, as to ultimate qualification but they assert that

[8] In line with § 9(c)(2) of the Act and *McKinney* v. *Missouri-Kansas-Texas R.R.*, 1958, 357 U.S. 265, 270–1.

now that they have completed the work requirement, their desired priority in seniority status is no more than the situation which would have existed had their civilian employment not been interrupted by service. The plaintiffs' position here is exemplified by the following excerpt from their reply brief:

> Appellants do not contest the existence of various conditions or "uncertainties" surrounding the completion of their 1040 days actual work on the job. * * * What appellant [appellee?] fails to take into account, however, is that following their return from military service, the veterans' satisfactory performance of the work requirement and their meeting of any proficiency test, their election of promotion to journeyman, and the existence of vacancies and availability of work at all material times have, in their particular cases, *resolved or eliminated* all of these "uncertainties." There is indeed nothing "automatic" about their completion of the work requirement, but once they have completed it, they are entitled to have their seniority date established, *nunc pro tunc*, as of the date they would have completed had they not entered military service.

We feel that this posture on the part of the plaintiffs compels a conclusion that the judgments for the defendant were correct. A review of the decided cases, however, is in order.

The landmark is *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 1946, 328 U.S. 275. That case concerned a shipyard welder, the 1940 Act, and a bargaining agreement which provided that layoffs, where ability was fairly equal, should be controlled by length of service. That the welder's relative seniority was maintained while he was in military service is ap-
112 parent from the Second Circuit's opinion in the case at 154 F. 2d 785, 787. The employee, however, claimed, when he was a victim of a layoff made in the inverse order of seniority, that the 1940 Act protected him against layoffs over all non-veterans. The Supreme Court rejected this argument and held that the welder was entitled only to the maintenance of his relative seniority on the welders' roster. In so doing it

articulated its escalator principle in the following frequently quoted language, pp. 284–8 of 328 U.S.:

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind. * * * He shall be "restored without loss of seniority" and be considered "as having been on furlough or leave of absence" during the period of his service for his country * * *. Thus he does not step back on the seniority escalator at the point he stepped off. eH steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * This legislation is to be liberally construed * * *. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. * * * He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. * * * No step-up or gain in priority can be fairly implied. * * * An employee on furlough or on leave of absence has a continuing relationship
> 113 with the employer * * *. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems * * *.

This interpretation was reaffirmed in *Trailmobile Co.* v. *Whirls*, 1947, 331 U.S. 40, 58, where it was said that the veteran is to be kept "in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence'"; in *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 1949, 337 U.S. 521, 526; and in *Oakley* v.

Louisville & Nashville R.R., 1949, 338 U.S. 278, 283.* Its subsequent codification in 1948 now appears as § 9(c)(2) of the present Act, 50 U.S.C.A. App. § 459(c)(2). This is recognized by the Supreme Court in *McKinney* v. *Missouri-Kansas-Texas R.R.*, 1958, 357 U.S. 265, 271. The retention of the present plaintiffs in their same relative positions on the helpers' roster after their military service was clearly in compliance with this principle.

Fishgold was followed by a number of cases concerning the application of the escalator rule to the more complex situation of the employee who, having attained seniority at one level, was, when called into service, in the process of completing a work period required for promotion to a higher level. These cases produced the following results:

(a) Where the work period was not for the development of proficiency but was for another purpose, such as the protection of the seniority of others, the claimant's time in military service was to be counted toward the period's completion.
114 *Spearmon* v. *Thompson*, 8 Cir., 1948, 167 F. 2d 626, 630–1, cert. den. 335 U.S. 822; *Moe* v. *Eastern Air Lines*, 5 Cir., 1957, 246 F. 2d 215, 220–1, cert. den. 357 U.S. 936. *Cf. Borges* v. *Art Steel Co.*, 2 Cir., 1957, 246 F. 2d 735.

(b) The converse was also established, that, is where the work period was for the development of proficiency, it was not to be satisfied in whole or in part, by military service but, instead, was to be actually worked. *Altgens* v. *Associated Press*, 5 Cir., 1951, 188 F. 2d 727, 729; *Lipscomb* v. *Tennessee Coal, Iron & R. Co.*, 5 Cir., 1951, 189 F. 2d 708; *Addison* v. *Tennessee Coal, Iron & Railroad Co.*, 5 Cir., 1953, 204 F. 2d 340, 342; *Nevins* v. *Curtiss-Wright Corp.*, 6 Cir., 1949, 172 F. 2d 535; see *Spearmon* v. *Thompson*, supra, 8 Cir., 1948, p. 630 of 167 F. 2d, and *Moe* v. *Eastern Air Lines*, supra, p. 220 of 246 F. 2d.

The issue now before us, however, involves a still further refinement. If the work period is one genuinely directed toward proficiency and thus, by the last cited cases, is actually

* Although the issue is not present in the cases before us, it is to be noted that the Supreme Court's definition of seniority is a broad one and allows consideration of far more than mere length of service. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, supra; *Ford Motor Co.* v. *Huffman*, 1953, 345 U.S. 330.

to be served, and if it is completed following the claimant's return from service, is he entitled to a seniority date in the earned position only as of the date of actual completion or retroactively to some earlier date? The decided cases, although often cited in support of varying points of view, seem to provide these answers:

(a) Where it is found, or where the parties have stipulated or conceded, that, but for the period of military service, the work period would have been completed by a date certain or in a particular order among the upgraded employees, or, in other words, that the claimant would have been promoted automatically or by reason of mere passage of time, the claimant-veteran is entitled to seniority in his new position retroactively to that earlier date or in that order. *Diehl* v.
115 *Lehigh Valley R.R.*, 1955, 348 U.S. 960, reversing, per curiam, the Third Circuit's decision at 211 F. 2d 95, which in turn had affirmed the district court, 22 C.C.H. Labor Cases, Par. 67,375; *Mann* v. *Crowell-Collier Publishing Co.*, 6 Cir., 1956, 239 F.2d 699, 701; *Norris* v. *Robertshaw-Fulton Controls Co.*, E.D. Tenn., 1957, 150 F. Supp. 431, 432; *Bostick* v. *General Motors Corp.*, E.D. Mich., 1958, 161 F. Supp. 212, 216; *Nichols* v. *Southern Ry.*, E.D. Ky., 1961, 194 F. Supp. 148, 150. See *McKinney* v. *Missouri-Kansas-Texas R.R.*, supra, 1958, 357 U.S. 265, 273–4.

(b) On the other hand, if the claimant's promotion is not certain (as is the case where comparative ability, physical condition, age, employer's discretion, and the like, are factors) but is only probable—even highly probable—retroactive seniority is withheld. *McKinney* v. *Missouri-Kansas-Texas R.R.*, supra, pp. 271–2 of 357 U.S., where it was said:

> However, § 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and

advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

116 Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer. * * * Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability.

Sularz v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, 8 Cir., 1958, 259 F. 2d 122, 124, where this court said:

> Since it is manifest that this is a strong or high probability situation, the trial court's conclusion finds full support in *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, supra. That case authoritatively put to rest the question of whether returning veterans are entitled to retroactive promotions and seniority rights by holding that, to entitle the veteran to relief, the facts must show that the veteran would have been upgraded automatically, and that a strong probability of advancement will not suffice.[1]

Raulins v. *Memphis Union Station Co.*, 6 Cir., 1948, 168 F. 2d 466, 469; *Poore* v. *Louisville & Nashville R.R.*, 5 Cir., 1956, 235 F. 2d 687, 691; *Bassett* v. *Texas & Pacific Ry.*, 5 Cir., 1958,

[1] In *Sularz*, although the issues litigated concerned other non-veterans, the railroad eventually gave the claimant the retroactive seniority refused here. See *Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, D. Minn., 1956, 148 F. Supp. 83, 85, and p. 123 of 259 F. 2d, footnote 2. This, however, was pursuant to a later agreement with the union and did not rest upon the provisions of the Act. It thus affords no precedent for the present cases.

258 F. 2d 819; *Horton* v. *United States Steel Corp.*, 5 Cir., 1961, 286 F. 2d 710, 713; *Palmquist* v. *Buhl Sons Co.*, E.D. Mich., 1959, 179 F. Supp. 638.

These decisional results are not contested by the claimants here. Their argument, as already indicated, is that, 117 despite the uncertainties which concededly existed at the time of their entry into military service, their return to work and their completion of the work period dispelled those uncertainties and rendered them unfounded in fact. Therefore, it is said, since the work period has been completed and they have elected carman's seniority, it follows that, but for the military service, the plaintiffs would necessarily have achieved the higher status just ahead of their next junior upgraded helpers. Unfortunately, from the plaintiffs' viewpoint, there appears to be little or no effective supporting authority among the numerous cases interpreting the Act. We have found only two cases, *Morris* v. *Chesapeake & Ohio Ry.*, 7 Cir., 1948, 171 F. 2d 579, cert. den. 336 U.S. 967; and *Conner* v. *Pennsylvania R.R.*, D.C. Cir., 1949, 177 F. 2d 854, cert. den. 339 U.S. 919, where courts of appeals appear to have allowed later events to dispel antecedent uncertainties. The serious obstacle to the authoritativeness of these two cases is the great likelihood that they are effectively overruled by *McKinney* and by its requirement, for a contrary result, that the promotion in question be automatic and that, seemingly, it be automatic as a matter of foresight rather than of hindsight.

Plaintiffs do not rest their cases on *Morris* and *Conner* but, instead, urge that the Supreme Court's summary and per curiam reversal of the Third Circuit's decision in the *Diehl* case compels a conclusion in their favor here; that uncertainties did exist in *Diehl*; and that they were eliminated by performance.

We disagree. The summary reversal in *Diehl*, if the case is not inconsistent with *McKinney*, is perhaps to be explained by a conviction on the Court's part that there was no uncer- 118 tainty involved in the *Diehl* facts. This seems to be indicated by the Court's positive reliance on *Oakley* v. *Louisville & Nashville R.R.*, supra, 338 U.S. 278, where no uncertainty is ascertainable from the Court's opinion, and by

the stipulation [4] in *Diehl*, p. [illegible] of 211 F. 2d, that the claimant "would have completed" the work period on a given date if there had been no military service interruption. These stipulated words imply that the work completion was not dependent upon prior resolution of any contingency or uncertainty.

The present cases are otherwise. The trial court found specifically that by the bargaining agreement the initial choice of carmen helpers for upgrading was a matter of selection, not upon chronological seniority alone, but by the union and the railroad "with due regard to seniority and qualifications for advancement"; that by this the parties meant "aptitude for learning the trade and skills of a carman"; that "they did not mean to imply that a helper selected for temporary advancement was to be considered as a qualified carman when selected"; that in actual practice, "the selection of helpers for upgrading was not always in strict order of seniority"; [5] that the 1040 day requirement called for actual work for that period and was intended by the railroad and the union as an on-the-job training period "for the purpose of increasing proficiency in skill through actual experience"; that actual practice "was in accord with that intention"; that helpers' completion of the work period was required before they were "considered
119 sufficiently skilled to qualify as carmen and acquire a carman's seniority"; that "the position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper"; that whether the plaintiffs, if they had not been in military service, would have worked as temporary carmen on every date work was available and would have completed the work period before the next junior upgraded helper or by any given date "is not certain, even though in retrospect it may be regarded as highly probable"; that it was also uncertain whether the

[4] The parties in their briefs here both refer to a stipulation in *Diehl*. We find no clear reference to a stipulation in the opinions of either the Third Circuit or the district court. Inasmuch, however, as the plaintiffs' present counsel argued the *Diehl* case in the Supreme Court, we assume the existence of the stipulation. In any event, the trial court there appears to have found as a fact that the plaintiff "would have completed" the work period on a given date.

[5] This is illustrated by the dates of upgrading of plaintiffs Beck and McClearn set forth in the table, supra.

particular plaintiff would have elected at the earlier date to relinquish his helper's seniority; that the upgraded helpers had no guaranty, either by contract or by actual practice, that they could ever complete the work requirement; and that completion of the date thereof depended "on a number of variable factors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position". Findings of this kind were not present in *Diehl*. We also note that each plaintiff's helper's seniority was at all times preserved, that only at the completion of the work period did the employee make his final choice between a currently dated carman seniority and the retention of an earlier achieved helper's seniority, and that the record discloses instances of voluntary retention of helper status and seniority following completion of the work period. All this, it seems to us, as it did to the district court, lacks the essentials of the automatic in the entire system of promotion from carman helper to full-fledged carman.

120 *McKinney* instructs us that each of these plaintiffs is not entitled to "perfect reproduction of the civilian employment that might have been his" if he had not been called to service; that there is much "that might have flowed from experience, effort, or change to which he cannot lay claim under the statute"; and that the Act "does not assure him that the past with all its possibilities of betterment will be recalled" or give him "a status that he could not have attained as of right". The situation here strikes us as clearly falling on that side of the factual line governed by *McKinney* rather than on the side governed by *Diehl*.

Of course, if *Diehl* and *McKinney* are in any way inconsistent in their holdings, we must necessarily follow *McKinney* as the latest pronouncement by the Supreme Court.

The plaintiffs would distinguish *McKinney* on the ground that the claimant there sought to establish only that his seniority rank alone gave him the right to promotion and that, having taken this stand, he had to prove that fact or lose his case. They further state that the Court's comments in *Mc-*

Kinney are manifestly inapplicable where a plaintiff's claim is based on seniority plus other elements and it is established as a fact that those other elements exist. This, they say, was the situation in *Diehl* and *Oakley*. Furthermore, all the uncertainties which had earlier existed had disappeared by the time of trial and thus had the veterans not been absent they would have been promoted ahead of the upgraders junior to them.

We think that *McKinney* is not so easily explained away. Accepting the trial court's findings as to contingencies and probabilities, which, as we have already noted, are not
121 challenged here, the reasoning of *McKinney* compels us to conclude that the entry of judgment for the defendant in each case was correct. Until the Supreme Court tells us otherwise, we necessarily follow what we feel is the holding of that case.

Affirmed.

122 In the United States Court of Appeals for the Eighth Circuit

SEPTEMBER TERM, 1961

No. 16814

DONALD I. TILTON, APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY

No. 16815

WILFRED L. BECK, JR., APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY

and

No. 16816

GUY H. MCCLEARN, JR., APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY

Judgment August 17, 1962

Appeals from the United States District Court for the Eastern District of Missouri

These causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and were argued by counsel.

On consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in these causes be, and the same is hereby affirmed.

AUGUST 17, 1962.

123 [Clerk's Certificate to foregoing transcript omitted in printing.]

OCTOBER TERM, 1962

No. —

DONALD I. TILTON, WILFRED L. BECK, JR., AND GUY H. MCCLEARN, JR., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD COMPANY

Order extending time in which to file petition for writ of certiorari—November 8, 1962

UPON CONSIDERATION of the application of the Solicitor General,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 14, 1962.

BYRON R. WHITE,
Associate Justice
of the Supreme Court of the United States.

Dated this 8th day of November, 1962.

125 Supreme Court of the United States

OCTOBER TERM, 1962

No. 664

DONALD I. TILTON, ET AL., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD COMPANY

Order allowing certiorari

February 18, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1963